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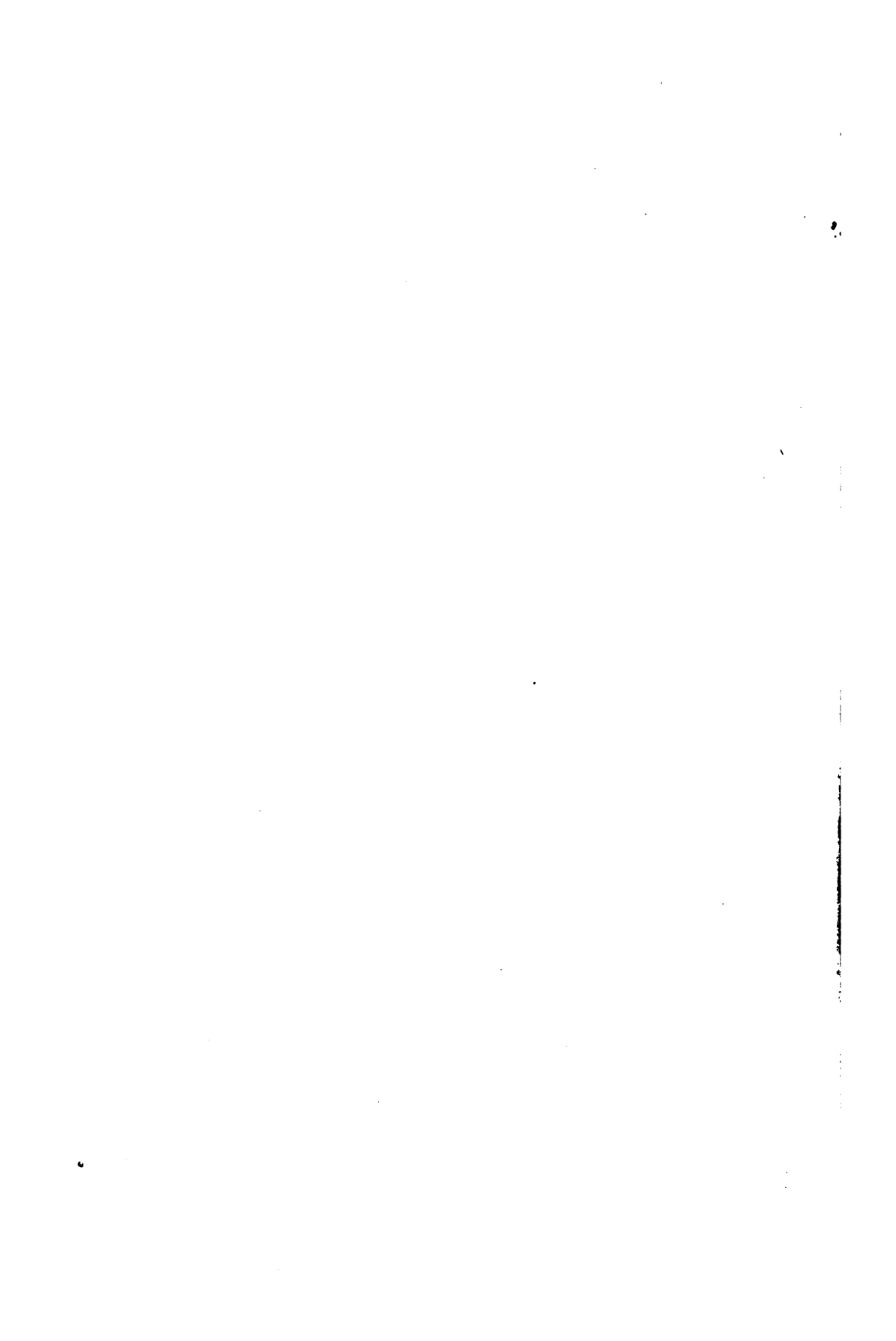
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REPORTS OF CASES
ARGUED AND DETERMINED,
DURING THE YEARS 1862 & 1863,
IN THE
HIGH COURT OF JUDICATURE
AT
Fort William in Bengal,
IN ITS
ORDINARY ORIGINAL JURISDICTION & ON APPEAL THEREFROM,

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND THE
PRINCIPAL MATTERS,

BY

EDGAR HYDE, M.A.,
OF THE INNER TEMPLE, ESQ.,
Barrister-at-Law, and Fellow of Corpus Christi College, Oxford.

VOL. I.

Calcutta:

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1867.

CALCUTTA:

REPRINTED AT THE LAW-PUBLISHING PRESS,

57, BOW-BAZAR STREET.

TO
THE HONOURABLE
SIR MORDAUNT LAWSON WELLS, KNT.,
LATE ONE OF THE JUDGES
OF
THE HIGH COURT OF JUDICATURE
AT
FORT WILLIAM IN BENGAL,
THIS VOLUME OF REPORTS
IS
RESPECTFULLY INSCRIBED.

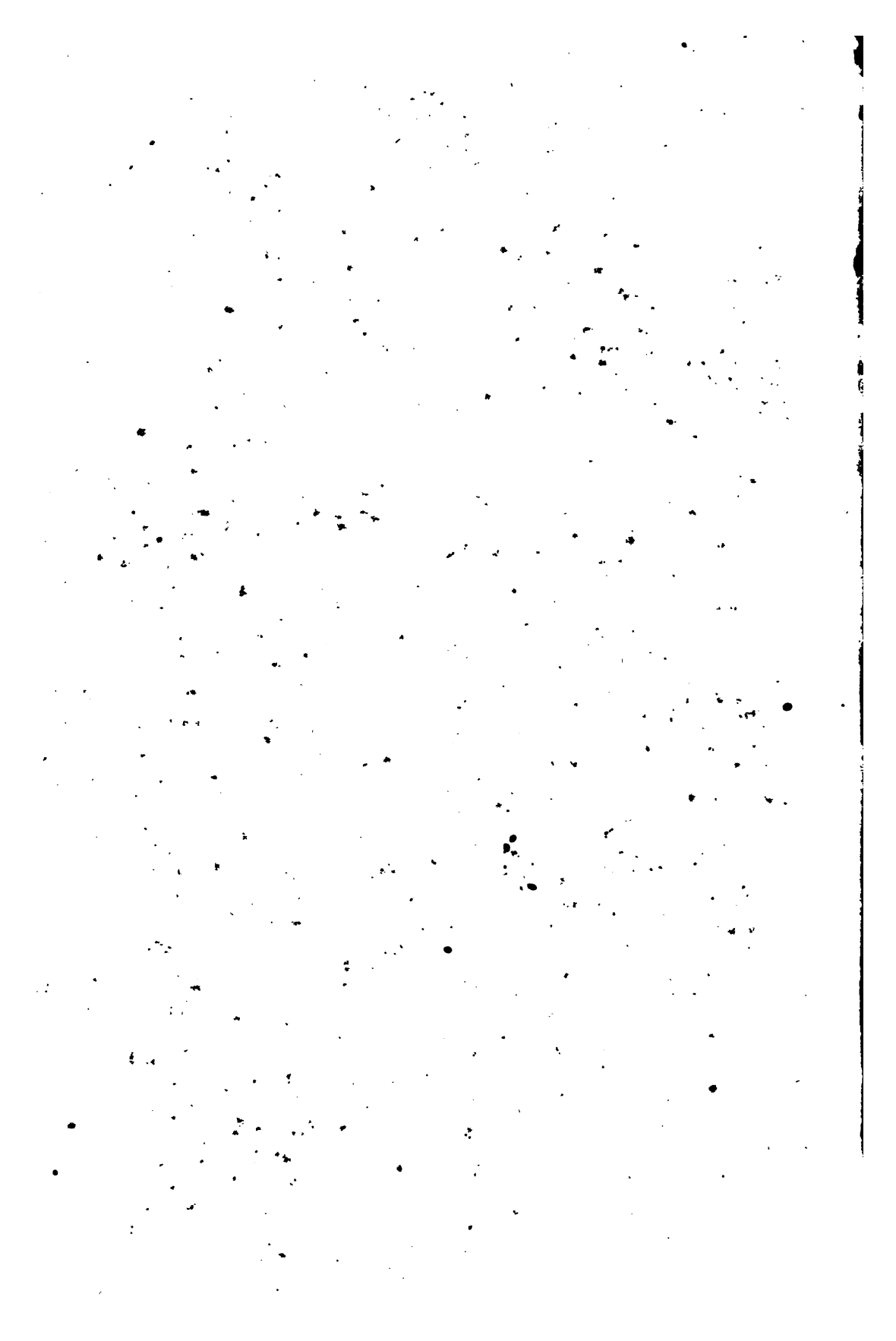


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LAW REPORTS.

HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

SIR MORDAUNT LAWSON WELLS.

EWING AND CO. vs. GRANT, SMITH AND CO.

Trade Marks—Action by Agent against Agent—Conflicting Evidence—Commission to England—Adjournment for that purpose.

THIS was a motion for an injunction to restrain the defendants from using a certain Hathi or Elephant trade mark on Turkey red dyed goods, such mark being alleged to be a colorable imitation of that used by plaintiffs. A proposal was made some time since to have the case tried on affidavit, but the offer not having been assented to, the case came on for hearing to day in the regular way.

Counsel for the plaintiffs: Mr. Doyne and Mr. Woodroffe.

Counsel for the defendants: Mr. Bell and Mr. Eglinton.

The issues were settled as follows:—

1. Whether the defendants have imported, exposed for sale, and sold in the Calcutta market Turkey red dyed goods, bearing a trade mark, which is a colorable imitation of that used by the plaintiffs.
2. Whether the said trade mark was in use before the use by the defendant of the trade mark said to be a colorable imitation of that used by the plaintiffs.
3. Whether the plaintiffs have a right to the exclusive use of the said trade mark mentioned in the plaint.

Mr. Doyne opened the case for the plaintiffs as follows : The present application is made by the firm of Messrs. Ewing and Co. to restrain another Calcutta firm, namely, the firm of Messrs. Grant, Smith and Co., from using on Turkey red dyed goods trade marks which are said to be a colorable imitation of that used by the plaintiffs. The firm which I represent has used the ticket so long that the Hathi or Elephant ticket is known as the plaintiffs' ticket throughout this side of India. The goods which bear the ticket are alleged by the plaintiffs to be superior to those sold by the defendants under the same mark. It is not necessary for the purpose of obtaining an injunction that this superiority should exist, but I believe we shall be able to show that the fact is so. It is clear that, on this point, however, there will be a conflict of evidence. This, I think, is manifest from the written statements. As regards the injunction, it will be sufficient to establish a right of user in the plaintiffs; for, if that right be proved to exist, the law will restrain the defendants from infringing it. The other point, though very important on the question of profits, cannot affect the right to injunction. The law on this topic is clearly laid down in *Perry vs. Truefitt*, 6 Beavan, and *Farina vs. Silverlock*, 1 Kay and Johnson. I believe that I shall be able to satisfy the Court that Messrs. Ewing and Co. have habitually used this ticket for the last fourteen years. Defendants allege that they have used a similar ticket for the same period. I say that they will be unable to establish this. In defendants' statements it is alleged that parties asking for Turkey red dyed goods with the Hathi ticket by no means understand that they are purchasing only the plaintiffs' goods. I shall be able to prove the incorrectness of this, and the Court will have to judge of the further allegation in the defendants' statement, which avers that there is a marked difference between the tickets; that they can easily be distinguished; and that the one is not a colorable imitation of the other. I must remind the Court that this is not the first case against Messrs. Sterling and Co.'s Calcutta Agents. They appeared in this Court as defendants in the Ghora case and in the Crane case, so that this is the third case against them; nor is this the first time that complaints have been made respecting the Hathi ticket. According to the evidence of Mr. Kilburn, which has been taken *de bene esse*, a complaint was made to that gentleman in 1860 relative to a consignment made to him bearing the Hathi ticket. Messrs. Schœne, Kilburn and Co. then undertook to sell no more such goods bearing the Hathi ticket. Another ticket was thereupon put forth, slightly altered from the former; and although every effort to settle the matter amicably has been made, the attempt has been unsuccessful. Messrs. Grant and Co., the present consignees of the goods in question, refuse to stop the sale, and allege their belief that Messrs. Sterling and Co. have been in the habit of using Hathi tickets for a very considerable period, and that the stoppage

of the sale would be equivalent to an acknowledgment that they have no right to use them.

Henry Hunter Murdoch.—I am one of the plaintiffs in this action. I am a partner in the firm of Messrs. Ewing and Co. My firm are agents in Calcutta for the firm of Archibald *vs.* Ewing and Co. They consign to us Turkey red dyed goods for sale on commission in the Calcutta market. They have done so for the last thirteen or fourteen years. The consignments have been extensive. They bear a peculiar trade mark. The mark (produced) was used exclusively upon certain classes of Turkey red dyed goods up to 1860. Upon an inferior sort a Lion ticket was used. In 1860 some small difference was made. The words 'warranted Turkey red' were taken out, and the words Archibald *vs.* Ewing and Co. in Devanagari and Bengali inserted. We are still selling goods under the old trade marks. The words were added in Devanagari and Bengali to protect our interests, because I thought there might be confusion. This confusion had nothing to do with defendants. Some short time ago it came to my knowledge that the other ticket, annexed to my affidavit, was imitated. That was shortly after my return from England in July. The Turkey red dyed goods of Messrs. Grant are inferior to those of Manchester and Switzerland, but are the best that come from Glasgow. Our Turkey red muslins are worth from six to seven annas per piece more than those which come from Glasgow. • Our Turkey red goods bearing the Hathi mark have been very largely circulated among natives. The goods are often asked for under the name of Hathi goods, and people buy them without seeing the musters. They buy the plain goods by the mark. I do not think we should get the same price for the goods without the ticket. On discovering that Messrs. Grant, Smith and Co. were selling Turkey red dyed goods bearing our ticket, I bought a case. I bought it through Mundel Chand, a broker. This (produced) is a portion of its contents. The value of these goods depends very much on the pattern. The goods I bought have not the name of W. Sterling and Co. on the ticket. In 1860 it was brought to my notice that Messrs. Schoene, Kilburn and Co. were imitating my tickets in Calcutta. I called upon them, and they took them off. I found other tickets then which were a colorable imitation of my tickets. Messrs. Schoene, Kilburn and Co. withdrew the ticket complained of. The ticket (produced) does not come from my firm in Calcutta. I have never seen it before. This ticket (another produced) is a ticket of my clients.

To Mr. Bell.—The goods upon which the marks are fixed are not Turkey red muslins. They are printed jaconets. The value depends on the pattern, color, and quality of cloth. I have had none of those goods for a long time. I consider the color of Mr. Sterling's goods not so bright as ours. They would

not be so valuable. The difference would be from two to three annas a piece. In buying and selling we judge by the color, the thickness and texture. I have only sold one case of the Turkey red dyed goods (produced) during the last year, and about eleven cases of all sorts of Turkey red dyed goods. When people come to me to buy these goods, they ask for the Hathi cloth. We keep two qualities of muslins—one with the Lion mark, and another with the Hathi mark. I was not aware that Ewing and Co. of Glasgow ever had a mark like the one produced. Previous to two years ago I never examined goods sent to sell. I left that to the brokers in the bazar. I began to pay attention to the matter in consequence of the question with which Mr. Kilburn was connected. Most manufacturers have private marks which they send out into the market. Sometimes they send goods with particular marks to particular agents. I first saw the naked Elephant on the day of Mr Kilburn's examination. He sent me one. I then got another from a native. I told him to procure me one, and he went to the bazar and brought me one. Mr. Sterling's dye is very nearly equal to ours, and I could hardly say which goods are the best without comparison. I am, however, of opinion that ours are the best. I knew that Sterling & Co. were selling goods, and presumed that they were selling jaconet. I made enquiries from brokers as to how Sterling's were selling. They knew what I meant. Sterling and Ewing were nearly rivals in the market. I never heard till I saw the affidavits that Sterling and Co. asserted that their jaconets are better than ours. To the best of my knowledge we were the only consignees of Ewing's Hathi mark. Goods sometimes are received here from Singapore. I do not think that we have ever been consignees of goods coming from Singapore. Parties coming to us to make purchases come mostly with a personal knowledge of the partners in the firm. I never buy Turkey red goods here in the market. A Hathi mark is common enough on other descriptions of goods throughout India. I have known the firm of Sterling and Co. above twelve years, and the firm of Ewing and Co. about the same time. The firm of Sterling and Co. is, I believe, rather the older of the two.

Mr. Williamson—I found the Calcutta House in existence when I came here. About the Home House I know nothing. I get Steiner's goods out from Manchester. They are superior to Ewing's.

Re-examined by Mr. Doyne.—Native dealers do not ask for the goods specifically: they ask for the tickets. Swiss goods are very superior as to dye. They bring higher prices than others. They come both plain and printed. The sale of the higher priced goods is about the same as that of the lower: if there is any difference, it is rather larger.

To the Court.—I have had great experience in designing. I should say it would be impossible for any one to design one of the tickets (produced) without having seen the other. I do not consider it possible that one of the two tickets before me could be produced, unless the designer had seen the other.

Mr. Bell.—I submit, my Lord, that the witness can hardly be considered to come under the class of experts. A man who dabbles in medicine is not allowed to give evidence in a matter of physic.

The objection was overruled by His Lordship, and the examination continued.

To the Court.—In my judgment a native would not be able to draw a distinction between the two tickets. I have been in the habit of designing. I designed a ticket in 1854. I designed two others in the last year. The one which I designed in 1854 has gone home to England.

Robert Brown Mackay.—I am a partner in the House of Gillanders, Arbuthnot and Co. We do an extensive trade in piece-goods, including Turkey red dyed goods. I know a great deal of Ewing's Turkey red dyed goods. I have known them since 1856. They bear the mark known as the Hathi ticket. I don't know any other Turkey red dyed goods known by the name of Hathi goods. Messrs. Ewing and Co.'s goods are usually known as bearing the Hathi mark. I do not know Sterling and Co.'s goods well. I do not know by what name they are called in the market. I believe Messrs. Ewing and Co.'s finest goods take the first place in the market.

Cross-examined by Mr. Bell.—I have never bought Turkey red-dyed goods in the market. I have known the quality of Messrs. Ewing and Co.'s goods for years past. I have had samples brought to me from the market as Mr. Ewing's goods. I cannot say whether I saw the ticket on any of those goods. We do not get any goods from the manufacturers. All we get are from purchasers. I should not like to rely upon my own judgment in respect to Turkey red dyed goods. I should call in my broker. I have known Swiss goods in the market with an Elephant ticket on them. They are not called Hathi goods. I know other marks of Ewing and Co. The Singi mark, or Lion mark, for instance. We have Steiner's goods as well as Ewing's. I think that they bear a higher price. Steiner's goods have a ticket with a Horse's head. I do not think that Sterling's goods are superior to Steiner's.

Re-examined by Mr. Doyne.—I have no doubt whatever but that the first place in the market is given to Ewing's goods.

Patrick Keith.—I am a member of the firm of Gladstone and Wyllie. I know the Hathi ticket by reputation. By Hathi goods are meant Ewing's

Turkey red dyed goods. The Hathi ticket is one of the best tickets in the bazar. My firm are agents for Hugh, Balfour and Co. Mackillan, Mackenzie and Co. were agents here for the Sterling's. The Balfour's mark was a Ghora mark.

Cross-examined by Mr. Bell.—I have never bought any of Sterling's Turkey red goods. I have casually seen the goods. I paid attention to the prices, but nothing else. I have not the slightest idea how many Hathi marks there were in the market. I never heard of any Hathi mark but one, namely, that of Ewing and Co. I do not know the mark produced.

Thomas Kannie Grant to Mr. Doyne.—I am a member of the firm of Lyall and Grant. My firm has been in the habit of receiving Turkey red dyed goods from Messrs. Sterling and Co. They have borne many tickets. One was an Image ticket, one a Horseman ticket, one a Boar's head ticket, and one a Clock ticket. There may be others, but I do not remember them. To my knowledge Messrs. Sterling and Co. never sent any Elephant tickets. I consider Ewing's Turkey red dyed goods to take the first place in this market. The value of Ewing's Turkey red dyed goods is now about 6-4, and that of Sterling's is about 5-12. I have always understood the Hathi ticket to represent Ewing and Co.

Cross-examined by Mr. Bell.—I have heard for years that Ewing's goods are the same as what are generally called Hathi goods. I have never seen the ticket (produced) before. I never bought Ewing's Turkey reds myself in Calcutta. I have received Steiner's Turkey reds. The goods (produced) are Steiner's goods. Their value is from 5 to 5-8 a yard. I have had a great deal of experience as to the excellence of goods in respect to color. The color of the patterns (produced) is inferior to the Swiss color, but it is a superior color for Glasgow. I should not expect Glasgow goods to bring a higher price than Swiss goods. The texture of the plaintiff's cloth is better than the texture of the defendants'.

To the Court.—The quality of the cloth is sufficiently near for both to fetch the same price with the same ticket. With different tickets there would be a difference in price, but not very material.

This closed the plaintiff's case, and it being past 4 o'clock, the Court adjourned till the following day, when Mr. Bell opened the defendant's case as follows :—

Mr. Bell.—Instead of having this case determined at home, the unusual course has been adopted of the agents here suing other agents. The plaintiffs receive a commission on all Turkey red dyed goods sold by them in Calcutta

bearing the trade mark in question. Now an injunction could have been obtained at home, which would have prevented any goods bearing the said trade marks from being sent to any part whatever. Now Mr. Murdoch, one of the chief witnesses for the plaintiff, admitted that he knew nothing about these trade marks till two years ago. I certainly should have expected the Court to have been favored with the testimony of at least one native witness to shew the circumstances under which the goods have been bought in Calcutta. I expected to see nine or ten witnesses put into the box to swear that they had bought Turkey red dyed cloth with the Hathi ticket under the impression that it was Messrs. Ewing and Co.'s cloth. I say that the Court is entitled to have such evidence, and that in the absence of such evidence, it is perfectly justified in assuming that such evidence is not produced simply because the plaintiffs are not able to produce it. The Court is entitled to go much further in this country than at home to protect natives, but this difference does not extend to granting injunctions where there is no evidence that natives have been deceived. The foundation of all these actions is first to prove the title to the mark, which cannot be done, except it be shewn that native merchants buy the goods under that mark as the goods of the firm using that mark. Now, why did Messrs. Ewing and Co.'s clients alter their mark as they confessedly did in 1860? If they had so good a title to the mark, why did they add their names in the Devanagri and Bengali character? My friend, Mr. Doyme, commented on the plaintiffs sticking to their ticket. Now we know that the firm of Messrs. Ewing and Co. have used the marks of the Elephant, the Lion, and the Parrot. Sometimes actions of this kind are brought for the purpose of puffing goods by shewing the superiority of the goods of one firm over those of another. There are five different Hathi marks in the market besides those used by the plaintiff, and the difference between the tickets used by the plaintiff and some of these is much less than that between those used by the plaintiffs and defendants; for not only is there a difference in brightness of color, but also in the position and appearance of the Elephants. Now the rule of law is that the similarity of mark must be such as to deceive a man using ordinary care. As to the relative qualities of the goods, the witnesses for the plaintiffs have leant rather towards the goods of the plaintiffs, but the witnesses of the defendant will shew the reverse.

The Court.—I confess that I do not see the importance of proving the difference of price. The question is not whether the native is deceived, but whether the plaintiff is injured.

Mr. Bell.—In general the price would not be material, my Lord, but in this case my learned friend, Mr. Doyme, endeavored to draw from the difference of value a reason why the defendants should strive to imitate the trade mark of

the plaintiff. To sum up, I say that the plaintiffs have not given legal and legitimate evidence as to the title of the trade mark. The case, as put by them, is as meagre as any case which ever came into a Court of Justice. With regard to my case, Mr. Steel will give his evidence as to what his knowledge of the mark is, but in addition to that I shall call a considerable amount of native evidence, which will, I think, shew satisfactorily what the real facts are.

James Steel.—I am a partner in defendant's firm. I have had great experience in several leading firms in Calcutta. I have had a great deal to do with Turkey red dyed goods. I have known the mark complained of during the last ten years. I have known it affixed to twills, jaconets, and prints. Formerly it was without the name of Sterling; latterly the name has been added. The name was added eight months ago. The other ticket was exactly the same, but there was no name. I knew Ewing and Co.'s mark vaguely when this action was threatened. I sent for it then. I never purchased Ewing's Turkey red dyed goods with Ewing's mark on them. I have known other Hathi marks on Turkey red dyed goods in the Calcutta market. The one produced is Huber's mark. I have known it since I came out, namely, for some twelve or fourteen years. I do not know what the natives call it. I have never known Turkey red goods in the market by the name of Hathi goods alone. Sterling and Co. have lately sent out a new ticket. I designed it from the Hindoo mythology. The design was a woman suckling an Elephant. My present firm has received consignments from Messrs. Ewing and Co. We have received some with the Parrot mark. They also use the Lion ticket. I have never seen any of their goods come from Bombay with the Hathi mark upon them. I have bought lately five cases of Steiner's goods. I paid five annas two pies per yard. The same day I was offered one pie more per yard for Sterling's goods. In my opinion the dye of Sterling's is better than that of Ewing's. I consider myself a judge of color. I believe Sterling's House has been established in Glasgow about 100 years. Messrs. Ewing and Co.'s House has been known by me for fourteen years.

Cross-examined.—I was about twelve years ago in the House of Messrs. McVicar, Smith and Co. They were the agents for Messrs. Sterling and Co. The goods used to come out with the disputed ticket upon them. Another ticket was also used. It was a small Crown ticket. I was afterwards in Smith, Farie's House. We used to receive Messrs. Sterling's goods then with the same ticket. We never received the Image ticket. We have never received goods with the mark of a Swan, a Boar's head, or a Clock. Kilburn and Co. were agents of Messrs. Sterling and Co. some time back. We adopted the Image ticket because I told one of the partners that the ticket was getting too common.

The Court.—The evidence is so conflicting that I shall not decide this case until a commission has issued to England for the purpose of ascertaining which of the parties has a title to the mark. Money in this case is no object whatever. The plaintiff and defendant, as at present standing, have no interest probably in the matter, but, as regards the firm in Glasgow, the question is one of supreme importance.

Mr. Bell.—I should wish to call one more witness before the case is adjourned.

Francis Beer.—I am in the firm of Cohn, Feilman and Co. We sell a quantity of piece-goods. I was formerly in the firm of Bishop and Co. I have resided in Calcutta since 1848. I know the Elephant mark produced. I have known it ever since I came out here. I do not see any resemblance between the two Elephant tickets produced—that of Messrs. Ewing and Co. and Messrs. Sterling and Co.

Court.—The case will be adjourned until after the commission. No injunction will be granted in the meanwhile, but the defendants must keep an account of what they sell.

Case adjourned *sine die* accordingly.

• AUGUSTUS GABRIEL ROUSSAC AND THE BENGAL PRINTING COMPANY LIMITED *vs.*
W. THACKER AND OTHERS.

Alleged Infringement of Copyright—Motion for Injunction—General Resemblance insufficient to establish the Right—Proof of unfair and undue use necessary in all cases — Where there is no original matter in the work, the strongest evidence of servile imitation and piracy must be afforded—Total failure of Plaintiffs' case in this instance—Decree in favour of Defendants—Suit dismissed with No. 3 costs.

Mr. Bell and Mr. Paul appeared for the Plaintiffs.

Mr. Doyne and Mr. Graham appeared for the Defendants.

Mr. Justice Wells.—The plaintiffs, claiming to be proprietors of three books respectively entitled "The New Calcutta Directory" for 1862, "The New Quarterly Alphabetical List" for October 1862, and the Almanack "Diary" for 1862, filed their plaint on the 30th January 1863 against the defendants, the proprietors of a book entitled "Thacker's Post Office Directory," which, with certain colorable alterations, the plaintiff alleges in the plaint to be a reprint of the said books published by the plaintiff, and

in which the copyright of the plaintiff was then subsisting, and that the defendants printed the same for sale, without the consent in writing of the plaintiff; and the plaintiffs claim damages to the extent of Rupees ten thousand, and seek to have the defendants restrained by injunction from selling any more of the said "Thacker's Post Office Directory," and also to have an account taken of the profits made by the sale of the latter work up to the time of the hearing of the cause.

The following issues were framed and recorded when the case came on for a first hearing under the 139th section of Act VIII. of 1859 :—

1. Whether the plaintiffs are registered proprietors of the publications mentioned in the plaint or either of them ?
2. Whether the plaintiffs, if registered proprietors, are entitled to the copyright claimed in the plaint, to any and what extent ?
3. Whether the plaintiffs are entitled to recover any and what damages for the improper infringement by the defendants of the plaintiffs' said copyright ?
4. Whether the plaintiffs are entitled to restrain the defendants, by injunction, from publishing or selling the publications complained of ?

It appears that the Directory of the plaintiffs was first published in the year 1856, and the copyright of the Directory for the year 1857 was registered, under Act XX. of 1847, in March 1857. In the year 1854 the plaintiff Roussac entered upon a compilation of Samuel Smith and Company's Directory for 1855, and he got half the net profits; one of the publishers of Smith's Directory being Messrs. Thacker, Spink and Company.

Previous to the publication of Thacker's Directory in 1863, the following works had been published in previous years :—

1st.—Samuel Smith and Company's Bengal Directory and Almanack, commenced as far back as the year 1830, and continued up to 1858.

2nd.—The Bengal Directory and Annual Register, compiled by Lewis, being a continuation of Samuel Smith and Company's.

3rd.—Sanders, Cones and Company's Calcutta Almanack and Book of Directions from 1858 down to the present time.

4th.—The Bengal Directory and Register, published by Scott and Company for 20 years down to 1850.

5th.—DeSouza's Book of Directions.

6th.—The Quarterly Army List from 1849 down to 1861.

- 7th.—The Bengal Civil Service Gradation List from 1849 to 1863.
8th.—Hay and Company's Pocket Diary and Almanack for 1862.
9th.—Payne and Company's Diary for 1862.
10th.—The Post Office Guide by C. K. Dove, 1855.
11th.—The Post Office Manual, 1858.
12th.—The Churchman's Almanack.
13th.—The East Indian Register, published by H. Allen and Company.
14th.—The Calcutta University Calendar.
15th.—Roussac's Directory from 1856 to 1862.
16th.—The Calcutta Gazette.

I have enumerated the above Directories and Almanacks for the purpose of reviewing the common sources of information available when the defendants commenced their publication in the year 1863.

I may observe that Roussac's Directory is, in many respects, a superior work to that of the defendants, the former containing much more information; and there is no comparison as to the mode in which the two books have been got up.

Before examining the affidavits and evidence adduced at the hearing of the suit, it is necessary to consider three preliminary legal objections raised by Mr. Doyne on behalf of the defendants:

Firstly.—It was contended that the plaintiffs' publications set out in the plaint could not be made the subject of copyright under Act XX. of 1847, and the learned Counsel relied principally on the language of the preamble of that Act, which is very general. It is as follows:—

“An Act for the encouragement of learning in the Territories subject to the Government of the East India Company, by defining and providing for the enforcement of the right called copyright therein.”

It must be conceded that the preamble favors the construction of the defendants' Counsel, but a preamble, although it is often allowed to assist the construction of the sections that follow it when there is an ambiguity in them, cannot be allowed to control the express words of the enactments when they are clearly expressed and repugnant to such preamble. In construing Acts of Parliament, we are to look not only at the language of the Preamble, or of any particular section, but at the language of the whole Act. In other words, an

Act of Parliament ought to be so construed as to advance the objects contemplated by the Legislature. And, on reference to the sections of Act XX. of 1847, it must be admitted that the language used may be construed so as to embrace publications such as those set out in the plaint. The English Copyright Act V. and VI. Vict. 45, and the repealed Act VIII. Ann, c. 19, entitled "An Act for the encouragement of learning," contain provisions in some respects similar to those of the Indian Copyright Act.

Copyright in India, as in England, is a right regulated by Statute law. The general doctrine, in reference to copyright in publications of the class of maps, road books, calendars, chronological and other tables, is not easily defined. "All human events," says Lord Erskine in *Mathewson and Stockdale*, "are equally open to all who wish to add to, or improve the materials already collected by, others making an original work." On the other hand, in *Longman and Winchester*, 16 Vesey 4269, Lord Eldon said he could not go the length of saying that there could not be copyright in such works; and that though every man has an undoubted right to compile a book from those sources which, whether in nature or in other books not subject to copyright, are public property and open to all yet if one man has with mental labor compiled such a book, another man shall not servilely copy from that book. The view expressed by Lord Eldon has prevailed in the Courts both in England and America down to the present time.

I have not felt myself at liberty to put a construction on Act XX. of 1847, apart from the decisions pronounced by the Judges under the English Acts, and certainly the decisions in England go the length of holding that such publications as those referred to in the plaint may be protected; consequently, I hold in the present case that the plaintiffs might, under special circumstances, maintain their suit for an infringement of copyright under Act XX. of 1847. To what extent a work of this description is entitled to protection, I shall consider hereafter.

The second point raised by Mr. Doyne is as to the insufficiency of the registration of the October Quarterly List, and the decision of this question turns upon the construction to be put upon the Eleventh Section of Act XX. of 1847.

The point is one of considerable difficulty, but I am of opinion that the registration of the July Quarterly List did not dispense with the necessity of registering the October Quarterly List.

The Eleventh Section of Act XX. provides "that the proprietor of the copyright in any Encyclopædia, Review, Magazine, Periodical work, or other

work published in a series of books or parts, shall be entitled to all the benefits of the registration in the office of the Secretary to the Government of India for the Home Department, under this Act, on entering in the said book of Registry the title of such Encyclopædia, Review, Periodical work, or other work published in a series of books or parts, the time of the first publication of the first volume, number or part thereof or of the first volume, number or part first published after the passing of this Act in any such work which shall have been published heretofore and after the passing of the said Act of Parliament III. and IV. William IV., c. 85, and the name and place of abode of the proprietor thereof, and of the publisher thereof, when such publisher shall not also be the proprietor thereof."

I consider such Quarterly List a separate and distinct book, and that the plaintiffs have not complied with the provisions of Act XX. of 1847. Consequently the plaintiffs are not in a position to sue the defendants in respect of the infringement of the copyright of the "October Quarterly Number," it not having been registered under Act XX. of 1847. The 14th Section enacts that the proprietor of copyright in any book shall not maintain any action or suit at law or in equity under the provision of the Act in respect of any infringement of copyright which has not been registered.

The third preliminary question raised for my decision turns upon the admissibility of a certificate of the registration of the "New Calcutta Directory" for 1857. I admitted the document at the trial, but certainly not for the purpose of enabling Mr. Bell to go into evidence with a view of proving an infringement of the copyright in that book, but on the ground that the registration of the book in question might have some bearing upon the general case. Upon further consideration I am clearly of opinion that the plaintiffs not having alleged in their plaint that the copyright in the Directory of 1857 had been infringed, they are not now entitled to go into a case not raised in the plaint or by their written statement.

I now proceed to the examination of the affidavits and the mass of parol and documentary evidence adduced at the trial, which lasted five days, during which seventeen witnesses were examined and forty-five exhibits put in evidence.

The facts of this case, which is one of great importance, have received at my hands the most anxious attention and consideration.

In cases like the present the usual practice in England is to refer the subject to an officer of the Court, whose duty it is to report the result of his comparison, and the Court acts upon such a report in making its final decree. The duties

hitherto performed by the Master, so far as regards the current business, have now devolved on the Judges themselves. Consequently I have been obliged in this case to enter not only into a minute investigation and comparison of the rival works, but also of the earlier Directories.

Mr. Roussac in his affidavit says that Thacker's Post Office Directory is a piracy of the one published by himself. In dealing with the facts I shall assume throughout that the Quarterly List of October 1862 has been properly registered. I have adopted this course, as in the event of this case being appealed, the learned Judges may not agree with me in the construction I have put on the Eleventh Section; and if I now shut out from my consideration the complaint in reference to the October Quarterly List, the case might have to be heard again at a ruinous cost to the parties. The defendants will not be prejudiced in the slightest degree, and the entire case, relied upon by the plaintiffs, will have received full consideration at my hands.

Almanack Calendar.—The first cause of complaint relates to the description of the weather and incidents of particular months, which the plaintiffs allege have been copied from their Directory. The defendants in their affidavit state that, so far from being original matter belonging to the plaintiffs on it, the same has appeared from year to year in the Bergal Directory and Annual Register of Samuel Smith and Company of the year 1856, and earlier and subsequent years, and in Sanders' and Cones' Almanack since the year 1859, and in Payne's Diary for 1862; and they further assert that the descriptive notes in Part I. of Thacker's book will be found published from year to year as early as 1846. Although this part of the case was not abandoned by the plaintiffs, it was certainly not seriously pressed at the hearing of the suit. I have examined the different books referred to in the defendants' affidavit, and the result of my inspection is altogether corroborative of their statements. I am satisfied that the descriptive notes in Roussac are palpable plagiarisms from earlier works.

Civil List.—The fifth paragraph in the plaintiffs' affidavit states that pages 8 and 9 of Part II. of the defendants' books, containing the "Disposition of the Civil List," are copied from pages 17 to 20 of the plaintiffs' publication, the "New Quarterly Alphabetical List for October last," and in support of this charge instances some errors which they assert have been copied by the defendants. The descriptions of "Lieutenant Col. R. Williams and Lieutenant O. M. Glubb" are referred to for that purpose, and other names inserted in the "Alphabetical List of Civil Servants" are described as errors which are corrected in the plaintiffs' Directory for 1863.

The defendants in their affidavit state that the second part of their Directory under the heading "Civil Directory," consists partly of a Civil Service List, the materials for which were supplied to them by Mr. Wetherall, an Assistant in the Civil Fund Office, and the compiler of a work entitled "The Bengal Civil Service Gradation List," which he commenced publishing in the year 1849. Mr. Wetherall was examined at the hearing of the suit on behalf of the defendants, and his evidence proved completely the correctness of the statements contained in the defendants' affidavit. Mr. Wetherall compiled the list from information obtained in this office, to which he had access.

Messrs. Thacker and Spink applied to him in September 1862 for information, and he agreed to furnish the information required for a consideration. Mr. Wetherall supplied the printer of "Thacker's Directory" with a copy of his own Gradation List, interleaved with corrections, and the proofs contained the corrections up to December 4th, 1862. I have compared both Roussac's Directory and Thacker's with Wetherall's Civil Gradation List, and I am perfectly satisfied that the information supplied by Mr. Wetherall was compiled without any reference whatever to Roussac's Directory. The name of "Lieutenant-Col. Williams" appears to have been inserted in Wetherall's last Gradation List; and in Hay's Almanack the names of "Lieutenant O. M. Glubb" and "Lieutenant-Col. Cunningham" are mentioned under the head of *Military Secretary*.

On further comparison of the plaintiffs' Directory with the defendants' Directory and Wetherall's book, I have discovered that all the errors described in Mr. Roussac's affidavit, as occurring in the defendants' Directory, are, for the most part, contained in Wetherall's last list.

Mr. Young admits having set up from Roussac's Directory the information respecting the Thanessur Station.

Law Directory.—The plaintiffs allege that page 1 of Part V. of the defendants' Directory is almost entirely copied from pages 233 and 234 of the plaintiffs' publication, the *New Quarterly List*, the division of type and italics being in each case identical. The defendants answer this part of the case by pointing out to corrections and additions; and, on a comparison of the two books, it will be found that the names of the *Hon'ble H. S. Moine*, *Sir C. Trevelyan*, *R. S. Ellis*, *A. A. Roberts*, *Baboo Ramgopal Ghose*, and the *Hon'ble Ashley Eden*, are mentioned in Thacker's Directory, and not in Roussac's "October Quarterly List." And the names of *H. D. H. Fergusson* and the *Maharajah of Puttiallah*, which are mentioned in the plaintiffs' October Quarterly List, are omitted in

the defendants' book. I have compared the plaintiffs' Directory with Samuel Smith and Co.'s of 1855, and I find that at page 1, Part V. of the latter, the division of types and italics is identical with that in both the plaintiffs' and defendants' publication.

Mr. Young in his evidence admits that he took page 1 of Part V. from Roussac, and sent it to Mr. Kirkpatrick, a clerk in the office of the Legislative Council, to be corrected, and stated that it was printed as corrected by Mr. Kirkpatrick. The next complaint has reference to the officers of the High Court. The plaintiffs say that page 2 of Part V. of the defendants' publication is an exact copy of page 235 of the plaintiffs' "October Quarterly List." The defendants say that the differences are very material; and, on a comparison of the two books, it appears that several additions are inserted in the defendants' book, as, for instance, the name of "J. P. Grant" as Officiating Remembrancer of Legal Affairs. The allegation as to similarity of arrangement is again insisted upon. Mr. Longueville Clarke, an Advocate of long standing, and distinguished for his accurate knowledge of all matters connected with the late Supreme Court, prepared, at the instance of Mr. Spink, the List of Advocates; and in all probability, in the preparation of that list, he consulted Roussac's Directory, as he had a perfect right to do, and that may account for the insertion in the defendants' book of certain errors and inconsistent descriptions appearing in both books. Mr. Young stated at the trial that the List of Attorneys was made up from forms filled up by the different firms, and from information obtained from Mr. Swinhoe, Honorary Secretary to the Calcutta Attorneys' Association; and he admitted that he took from Roussac, page 6, Part V., and sent it to Mr. Harwood of the Police to be corrected with the additions of Mr. Spink. Of course, Mr. Young went to the latest book, as he says, to save corrections of the press.

Clerical Directory.—I pass on to the next subject of complaint, and the plaintiffs say that page 1 of Part VII. of the defendants' book is copied from page 1 of Part II. of the plaintiffs' Directory, and they rely upon the circumstance of the order in which the churches and chapels are arranged in Thacker's Directory.

The defendants say in their affidavit that they submitted to Mr. Abbott, the Registrar of the Diocese of Calcutta, a list, and that such list was set up from a form used in similar publications. Now, the defendants in making this statement must have been misled and deceived by Mr. Young; for, although it may be perfectly true that other publications contain lists in the same form,

it was admitted at the trial by Mr. Young that the list submitted to Mr. Abbott was set up from Mr. Roussac's Directory. I have carefully compared the defendants' book with three other publications, "Roussac's Directory," "The Churchman's Almanack," and "Samuel Smith's Directory of 1855," and I find that the lists are substantially the same, the greatest similarity being between Roussac's and the defendants'; but the *Thakurpur Chapel* and the *Kistopore Chapel*, which are inserted in the former, are omitted in the latter. In the "Churchman's Almanack" St. Peter's Church is placed before St. Thomas' Church, whereas in "Roussac's Directory" of 1862, in "Samuel Smith's Directory of 1856," and the defendants' book, St. Thomas' is placed first. It appears that certain alleged errors in Roussac's book, occurring in the description of the Missions, have been copied into Thacker's Directory, and the plaintiffs rely upon the mis-spelling of the names of several Missionaries; and I cannot reconcile the repetition of these errors with any other supposition than that they were copied from Roussac's Directory, and not corrected by the individuals who had forwarded to them the lists for correction. It was contended by Mr. Doyne that inasmuch as the returned lists contained the names as spelt in the defendants' Directory, probably the names are not mis-spelt. I think this can hardly be the case, and that the errors occurred in the manner therein suggested.

Religious Societies.—The plaintiffs allege that pages 13, 14, and 15 are arranged identically in the same order as pages 3, 4, 5, 6, 7, and 8 of Part VI. of plaintiffs' publication, and several errors are pointed out in the affidavits which have been copied by the defendants into their publications.

The defendants, on the other hand, say that the same arrangement is to be found in Samuel Smith's *Bengal Directory* of 1856, and that the list of each Religious Society was sent by the defendants to the Secretary of each Society for correction. This averment is corroborated by the parol evidence of Mr. Young. I have myself made a close comparison of the two books on this point. I have also compared Roussac's Directory with that of Samuel Smith's of 1855, and it is manifest that the type and arrangement are almost identical.

Educational Directory.—Under this head two or three errors appear in both books. Plaintiffs point out specially the description of the *Dowton College*. The defendants, on the other hand, say that the list in this case was submitted to Mr. Bruce, one of the masters, and was passed by him as correct. On comparing the two books, I find many differences. The plaintiffs refer also to the description of *Bishop's College* in the two books. The defendants assert that the plaintiffs' book is a mere copy

the defendants' book. I have compared the plaintiffs' Directory with Samuel Smith and Co.'s of 1855, and I find that at page 1, Part V. of the latter, the division of types and italics is identical with that in both the plaintiffs' and defendants' publication.

Mr. Young in his evidence admits that he took page 1 of Part V. from Roussac, and sent it to Mr. Kirkpatrick, a clerk in the office of the Legislative Council, to be corrected, and stated that it was printed as corrected by Mr. Kirkpatrick. The next complaint has reference to the officers of the High Court. The plaintiffs say that page 2 of Part V. of the defendants' publication is an exact copy of page 235 of the plaintiffs' "October Quarterly List." The defendants say that the differences are very material; and, on a comparison of the two books, it appears that several additions are inserted in the defendants' book, as, for instance, the name of "J. P. Grant" as Officiating Remembrancer of Legal Affairs. The allegation as to similarity of arrangement is again insisted upon. Mr. Longueville Clarke, an Advocate of long standing, and distinguished for his accurate knowledge of all matters connected with the late Supreme Court, prepared, at the instance of Mr. Spink, the List of Advocates; and in all probability, in the preparation of that list, he consulted Roussac's Directory, as he had a perfect right to do, and that may account for the insertion in the defendants' book of certain errors and inconsistent descriptions appearing in both books. Mr. Young stated at the trial that the List of Attorneys was made up from forms filled up by the different firms, and from information obtained from Mr. Swinhoe, Honorary Secretary to the Calcutta Attorneys' Association; and he admitted that he took from Roussac, page 6, Part V., and sent it to Mr. Harwood of the Police to be corrected with the additions of Mr. Spink. Of course, Mr. Young went to the latest book, as he says, to save corrections of the press.

Clerical Directory.—I pass on to the next subject of complaint, and the plaintiffs say that page 1 of Part VII. of the defendants' book is copied from page 1 of Part II. of the plaintiffs' Directory, and they rely upon the circumstance of the order in which the churches and chapels are arranged in Thacker's Directory.

The defendants say in their affidavit that they submitted to Mr. Abbott, the Registrar of the Diocese of Calcutta, a list, and that such list was set up from a form used in similar publications. Now, the defendants in making this statement must have been misled and deceived by Mr. Young; for, although it may be perfectly true that other publications contain lists in the same form,

it was admitted at the trial by Mr. Young that the list submitted to Mr. Abbott was set up from Mr. Roussac's Directory. I have carefully compared the defendants' book with three other publications, "Roussac's Directory," "The Churchman's Almanack," and "Samuel Smith's Directory of 1855," and I find that the lists are substantially the same, the greatest similarity being between Roussac's and the defendants'; but the *Thakurpur Chapel* and the *Kistopore Chapel*, which are inserted in the former, are omitted in the latter. In the "Churchman's Almanack" St. Peter's Church is placed before St. Thomas' Church, whereas in "Roussac's Directory" of 1862, in "Samuel Smith's Directory of 1856," and the defendants' book, St. Thomas' is placed first. It appears that certain alleged errors in Roussac's book, occurring in the description of the Missions, have been copied into Thacker's Directory, and the plaintiffs rely upon the mis-spelling of the names of several Missionaries; and I cannot reconcile the repetition of these errors with any other supposition than that they were copied from Roussac's Directory, and not corrected by the individuals who had forwarded to them the lists for correction. It was contended by Mr. Doyne that inasmuch as the returned lists contained the names as spelt in the defendants' Directory, probably the names are not mis-spelt. I think this can hardly be the case, and that the errors occurred in the manner therein suggested.

Religious Societies.—The plaintiffs allege that pages 13, 14, and 15 are arranged identically in the same order as pages 3, 4, 5, 6, 7, and 8 of Part VI. of plaintiffs' publication; and several errors are pointed out in the affidavits which have been copied by the defendants into their publications.

The defendants, on the other hand, say that the same arrangement is to be found in Samuel Smith's *Bengal Directory* of 1856, and that the list of each Religious Society was sent by the defendants to the Secretary of each Society for correction. This averment is corroborated by the parol evidence of Mr. Young. I have myself made a close comparison of the two books on this point. I have also compared Roussac's Directory with that of Samuel Smith's of 1855, and it is manifest that the type and arrangement are almost identical.

Educational Directory.—Under this head two or three errors appear in both books. Plaintiffs point out specially the description of the *Doveton College*. The defendants, on the other hand, say that the list in this case was submitted to Mr. Bruce, one of the masters, and was passed by him as correct. On comparing the two books, I find many differences. The plaintiffs refer also to the description of *Bishop's College* in the two books. The defendants assert that the plaintiffs' book is a mere copy

of the account contained in the "Churchman's Almanack." I have compared this book with the plaintiffs' and defendants' Directories, and it is abundantly clear that both the plaintiffs and the defendants have used the "Churchman's Almanack" to a great extent. I do not say improperly. The Reverend Editor of the "Churchman's Almanack" was examined at the trial, and stated that the information, compiled by himself, contained in his Almanack, appears in Roussac's Directory. In the description of the Calcutta University in the defendants' book there are 50 names not mentioned in the last edition of Roussac. Under the head "*Department of Public Instruction*" the omissions, alterations, and corrections in the defendants' Directory are considerable.

Commercial Directory.—The plaintiffs in terms charge the defendants with having copied from their book the List of Merchants, and in support of their allegation they point out two errors—one in reference to "W. H. Bailly," whose name, though properly omitted in the Quarterly List, appears in the plaintiffs' Directory, and also appears in the defendants' Directory; and another in the case of "J. E. Machlachlan," whose address is correctly stated in the October Quarterly List, but incorrectly stated in the two Directories, the same mistake occurring in both.

The defendants, on the other hand, rely upon differences in the two books, and explain that the names in this part of the publication were compiled chiefly from returns from runners employed by the defendants, and that changes which occurred late in the year could not be introduced.

Much the same complaint is preferred against the defendants as regards the list of brokers, and, substantially, the same answer made as in the last case.

Disposition of the Trade List.—Here again the plaintiffs rely upon the insertion of errors in the defendants' book, and mention especially the names of "*Mrs. Caldwell*," "*Mrs. Farquhar*," and "*Mrs. Ross*," all boarding-house-keepers.

The defendants say that these names of Farquhar and Ross appear in the Almanack of *Messrs. Sanders and Cones* and in *Payne's Diary*, both published in the year 1862, before any of the plaintiffs' publications were registered. I have looked into these publications, and I find the names as stated by the defendants in their affidavit.

The *Quarterly List for October* omits the name of Mrs. Farquhar, and contains that of Mrs. Ross, and this rather shews that the defendants did not

depend only on the publications of the plaintiff. Mr. Bell pressed upon my attention the circumstance of the mis-spelling of *Mrs. Caldwell's* name in both books. Mr. Doyme contended that it was by no means certain that the name was mis-spelt. The parol evidence of Mr. Roussac is corroborative of the plaintiffs' affidavit, and *again* it is more than probable that Mr. Young may have set up from Roussac the name of *Mrs. Caldwell*.

Mr. Young stated at the trial that Part X. of the defendants' Directory was made up partly from Trade Returns and partly from Street Returns, and that, except in using Roussac's Directory for addresses, the whole was made up from original returns.

Conveyance Directory.—I think I am correct in stating that the plaintiffs' affidavit does not specially prefer any complaint under this head; there is a general allegation "*that in several other respects,*" but at the hearing of the suit the conduct of the defendants, in reference to the Conveyance Directory, was a question in the cause. Mr. Young says that the portion from pages 1 to 24 of Part XI. was compiled from original prospectuses received from the different Companies.

The evidence of Mr. Batchelor, the Traffic Manager of the East Indian Railway Company, is confirmatory of Mr. Young's statement. Mr. Batchelor stated that, upon being applied to by Messrs. Thacker, Spink and Co., he gave directions to the officers in his establishment to send all the information required. Mr. Pierce also of the East Indian Railway supplied the list of persons employed in his department.

Docking Companies and Docks.—The plaintiffs in express terms say that the description contained in pages 28 and 29 of Part XI. of defendants' Directory is copied from pages 88m and 88n of Part VIII. of plaintiffs' book. The defendants answer this head of complaint by stating that the same arrangement is to be found in Smith's Directory for 1858. And it will be found on reference to the two books that there are some striking differences in the statements. In the description of the Calcutta Docking Company, the defendants' book states the capital of the Company and the names of the Directors, both which particulars are omitted in the plaintiffs' book. There are other differences which I think it unnecessary to state in detail.

Banking Directory.—The plaintiffs say that the description of the various Banks at pages 1, 2, 3, 4, 5, 6, and 7 of Part XII. of defendants' book is copied from the plaintiffs' book. The evidence of Mr. Gordon, an officer in the Bank of Bengal, who was called on the part of the defendants, went far to rebut

this head of complaint. Mr. Gordon stated that he received a slip from the Secretary of the Bank, sent by Thacker and Spink, and that he corrected the slip and sent it to the defendants. Mr. Gordon distinctly stated that he corrected it without looking at any other book, and that he made corrections and several additions; and it also appears that he corrected slips for the plaintiffs and for Sanders and Cones. I have compared the descriptions of the Bank of Bengal in the two Directories; and alterations, omissions, and corrections amount to 22. It will be found that in the defendants' book detailed particulars are given of the North-Western Bank of India in liquidation which are not noticed in the plaintiffs' book.

Assurance Directory.—The plaintiffs do not in their affidavit make a specific charge under this head, but the matter was discussed at the trial. Mr. Roussac gave evidence touching this part of the case. Mr. Young stated that the description of the Insurance Offices was taken from original pamphlets supplied by the offices. Of course, the offices would have a direct interest in furnishing the information. Mr. Young admits that he set up from Roussac the Marine and Fire Offices, and sent the lists for correction. And it will be found on reference to the two books that the defendants have inserted at least three Companies not mentioned in the plaintiffs' publication.

Post Office.—The affidavit of Mr. Roussac contains two distinct charges: *Firstly*, that the Table of Distances at pages 6 to 12 of Part VII. of defendants' Directory is an exact reprint from the Table contained in plaintiffs' Directory at pages 59 to 64 of Part I. And it is pointed out, as a circumstance corroborative of plaintiffs' statement, that certain errors contained in the plaintiffs' book appear also in defendants' publication. Mr. Roussac stated at the trial that he compiled the postal distances from an old book he discovered at Bombay, and from returns obtained from the Mofussil and the Punjaub Government. I was struck at first with this evidence. Mr. Roussac, in a subsequent part of his evidence, stated that he could not exactly say from what book he had originally taken the postal distances. And when his attention was called to the East India Register and Army List, he could not say that the Table of Postal Distances in his book was not taken from this publication. I have examined with much care the postal distances contained in the "East India Register," in "Samuel Smith's Directory for 1856," in the "Bombay Directory for 1862," and in "Sanders' and Cones' Book for 1861," and I find that the Postal Distance Table inserted in the plaintiffs' and defendants' Directories is almost identical with that contained in the publications I have

alluded to. It is far from my wish to say one word derogatory to the character of Mr. Roussac, whose industry and perseverance is worthy of praise; but I must say that Mr. Roussac's evidence, as regards the postal distances, was exceedingly unsatisfactory. Before I consider the evidence of Mr. Dove, the Postmaster-General of Bengal, on this point, I will consider the complaint made by Mr. Roussac as to the "*Post Office Rates*." It is stated in the plaintiffs' affidavit that these rates are also taken by the defendants from the plaintiffs' publication. The defendants say that the information contained in Part XIV. of their publication was supplied to them by Mr. Dove, and they assert that the "postage rates" contained in their book are not taken from Roussac, and that the same have long been public property published in the "*Post Office Manual*," in the "*Post Office Guide*" published by Mr. Dove, in Sanders' and Cones' "*Almanack*" in 1862, in the "*Churchman's Almanack*" for 1862, and in Hay and Company's "*Diary*" for 1862. I have carefully collated the postage rates contained in these different publications, as well as those contained in the plaintiffs' and defendants' Directories, and I have no difficulty in saying that, in my judgment, the "rates of postage" contained in all the Directories and Almanacks mentioned above are substantially one and the same. Mr. Dove, in his evidence, places the matter beyond all doubt. Mr. Dove says, in reference to "postage rates" inserted at page 13 of

- Part XIV. of defendants' book, that the matter is taken for the most part from the Post Office Schedule abstracted out of Act XVII. of 1854; and on the question of "postal distances," that, as far as Bengal is concerned, the greater number of distances was published by him in 1855. Mr. Dove produced a set of nine Polymetrical Tables, shewing the distances between the several Post Office stations, framed by Captain Taylor as far back as 1837, a Steam Postage Schedule for the Post Offices in India, "*The Bengal Postal Advertiser* for 1861," and "*Tables of Postage Rates*." I have looked through these documents with the view of ascertaining how far Mr. Roussac can lay claim to having printed and published an original compilation in respect of the postage rates.

Literary and Scientific Societies.—Mr. Young admitted at the hearing of the suit that the portion from pages 1 to 7 in Part XV. of the defendants' book was set up from Roussac, and afterwards corrected by the Secretaries of the different Societies. I have made a comparison between the two books as regards the Asiatic Society and the Dalhousie Institute. I find 34 corrections and omissions as regards the first Society, and 27 alterations, omissions, and corrections in the description of the other Society.

Street Directory.—I now approach the consideration of that portion of the plaintiffs' case which is not specially alluded to either in the affidavit or written statement, but which seems to me the strongest part of the plaintiffs' case, as I am satisfied the defendants, by their agent, Mr. Young, have used extensively the plaintiffs' publication in the preparation of this part of their Directory. It must be borne in mind that a Street Directory necessarily involves considerable research and labour ; and it is most important to ascertain the nature and extent of the use made of Roussac's. The learned Counsel for the plaintiffs, Mr. Bell, rested this part of the plaintiffs' case on the comparison of the two books, and pointed out the insertion in the defendants' book of several errors contained in the plaintiffs' book. Mr. Young stated that he had supplied the inhabitants with Circulars, and that he commenced his work in August personally and by employing runners, and by post out of Calcutta ; that he employed two persons at Rs. 40 each per month, and several peons. I have devoted many hours to the wearisome task of making a comparison of the rival Street Directories. I selected the names under four letters for a minute comparison, and in respect of those names I find the corrections, additions, and omissions exceed 350 in number.

Mofussil Directory.—Mr. Young stated that this portion of the Directory was obtained from the Army List, the Civil List, and Roussac, and that in almost every case the list was forwarded for correction either to the Post Master or some other official (in some instances to two parties), and that the returns were printed as they came back corrected. Mr. Young admitted that the account of Rewah was copied from Roussac, but before doing so he had applied to a Mr. Coles for information. I have selected four places for minute comparison—Agra, Allahabad, Meerut, and Umballah, and I find the omissions, corrections, and additions to be considerable—not less than 250 in number.

I have compared the description of Serampore and Chandernagore, and find 8 differences in the former, and 10 in the latter.

Mr. Wyman, the Head Printer at the Military Orphan Press, stated that the defendants' Directory was printed at that Press ; he proved that the book was printed from manuscript returns. Mr. Wyman stated that he did not receive instructions from Messrs. Thacker, Spink and Co. as to type, and it appears that in 1859 Roussac's Directory was printed at the Military Orphan Press, and that in printing the defendants' book the same type was used ; consequently there is a close resemblance between the type of Roussac's book and that of the defendants' book.

Mr. Wyman was present on the occasion of Messrs. Barham and Spink ordering Mr. Young not to make use of Roussac's book.

Mr. Young was obliged to admit at the trial that he had made use of Roussac's Directory, and had kept back from his employers, and also from Mr. Wyman, the fact of his having done so; and I must say that Mr. Young's affidavit is framed in a manner calculated to mislead not only the Court, but the parties to the suit. I consider Mr. Young's conduct in wilfully suppressing facts in his affidavit highly reprehensible. I have given this part of the case my most anxious consideration, as considerable reliance was placed on Mr. Young's affidavit for the purpose of shewing that he used Roussac's Directory with an *animus furandi*. I consider the defendants themselves acted throughout in a straightforward and honorable manner.

I must now proceed to the consideration of the authorities bearing upon the subject.

In the case of *Hogg vs. Kirby* in 8 Vesey, Jr., page 215, Lord Eldon says: "As to copyright, I do not see why if a person collects an account of natural curiosities and such articles, and employs the labor of his mind by giving a description of them, that is not as much a literary work as any others that are protected by injunction and by action. It is equally competent to any other person, perceiving the success of such a work, to set about a similar work *bond fide* his own."

It is clearly settled not to be any infringement of the copyright of a book to make *bond fide* extracts from it, or a *bond fide* abridgment of it, or to make use of the same common materials in the composition of another work. The correctness of this principle can hardly be questioned, but, as stated by Mr. Justice Story at page 243 of his Treatise on Equity Jurisprudence, "what constitutes a *bond fide* case of extracts, or a *bond fide* abridgment, or a *bond fide* use of common materials, is often a matter of most embarrassing inquiry."

Most of the cases have been, not when a new book has been published as part of the old work, but when, under color of a new work, the old work has been republished, as is the complaint in the present suit. The case of *Cary vs. Longman*, 1 East, page 358, was an action on the case for pirating a book entitled "*Cary's New Itinerary of the Great Roads throughout England and Wales*." At the trial before Lord Kenyon, it appeared that the original foundation of both the plaintiff's and defendant's books was a work first published in 1771 by Mr. Paterson. In 1797 the plaintiff was employed by the Postmaster-General to

make an *actual* survey of the principal roads, and the book published by him contained many material corrections of, and additions to, the last edition of the original work by *Paterson*. The book published afterwards by the defendant as the 12th edition of the original work by *Paterson* appeared to have been copied, nine-tenths of it, *verbatim* from the plaintiff's improvements, and many of the alterations were merely colorable. Under these circumstances *Lord Kenyon* held that the plaintiff had no title on which he could found an action to that part of his book which he had taken from *Mr. Paterson's*, but that he had a right to his own additions and alterations, many of which were very material and valuable.

In *Mathewson vs. Stockdale*, 12 Vesey, Jr., p. 270, the ground of the work was a catalogue of names, appointments, and such other information constituting the "*East India Calendar*;" upon inspection of the books, though there was some trifling variation in the titles, the mode of printing was exactly the same; the pages contained the same number of lines; in the long list of casualties, removals, and deaths, there was not the least variation; the indices, moreover, were the same; but the defendant had inserted some new matter, principally the *Ceylon* establishment.

Under these circumstances the Lord Chancellor held that the plaintiff was entitled to have the injunction continued until the hearing.

In *Wilkins and Aitken*, 17 Vesey, page 242, the doctrine as to what may be considered an honest use of a preceding publication was much discussed. The plaintiff had published a work in one volume folio, under the title of the "*Antiquities of Magna Græcia*," and the defendant published a treatise in one volume folio entitled "*An Essay on the Doric Order of Architecture*," in which he inserted some parts of the plaintiffs' work, but the greater part of the defendants' work was compiled by himself from materials common to both parties. And on behalf of the defendants it was contended that the quotations, abridgments, and copied lines were such as might fairly be taken by one author from another. Lord Eldon said, "There is no doubt that a man cannot, under the pretence of a quotation, publish either the whole or a part of another work. The question upon the whole is whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work. The effect, I have no doubt, is prejudicial, and the injunction ought not to be dissolved."

In *Longman and Winchester*, 16 Vesey 273, the plaintiff and others published, in November 1808, a book under several titles, *viz.*, "*The Royal Calen-*

dar," "*The London Calendar*," and "*The Court and City Calendar*." The defendant, in May 1808, published a work of a similar description under the title of the "*Imperial Calendar*," containing the same lists, and *wholly copied* from the plaintiffs' work, including some remarkable errors which were exactly followed in the latter work. Lord Eldon, in the course of his judgment, said: "Assuming that there may be a copyright in a work of this description, there is not much difficulty in the rest of the case. Take the instance of a map describing a particular country, and a map of the same country afterwards published by another person; if the description is accurate in both, they must be pretty much the same, but it is clear the latter publisher cannot on that account be justified in sparing himself the labor and expense of actual survey published by another. So as to '*Paterson's Road Book*,' it is certainly competent to any other man to publish a book of the roads; and if the same skill, intelligence, and diligence are applied in the second instance, the public would receive nearly the same information from both books; but there is no doubt this Court would interpose to prevent a mere republication of a work which the labor and skill of another person had supplied to the world. The injunction must go; but I have said nothing that has a tendency to prevent any person from giving to the public a work of this kind, if it is the fair fruit of original labor, the subject being open to all the world."

In *Mawman vs. Tegg*, 2 Russ., page 385, the plaintiffs claimed to be the proprietors of a work entitled the "*Encyclopædia Metropolitana*," which was commenced in January 1818, and was intended to be completed in fifty parts. In August 1821 the plaintiff purchased the first five parts, and afterwards published twelve other parts. In January 1826, the defendants published the first part of the work entitled the "*London Encyclopædia*," which was edited by the gentleman who had been the Editor of the first five parts of the "*Encyclopædia Metropolitana*." In March the plaintiffs first discovered that many of the articles in Tegg's publication were copied *verbatim*, or nearly so, from the "*Encyclopædia Metropolitana*." The Lord Chancellor, in the course of his judgment, said: "Under all the difficulties of this case, it seems to me that the proper way of proceeding would be to send it to the Master to ascertain all the parts of the "*London Encyclopædia*" which have been pirated from the "*Encyclopædia Metropolitana*." This becomes more necessary when you consider what the language is which both Lord Mansfield and Lord Ellenborough have used

in summing up to juries. In respect to pirating dictionaries, charts, &c., Lord Mansfield expressly says that you are not merely to look at what is published in the one work, being part of the other work, but that you are to consider whether the matter alleged to have been copied has, upon the whole, been used in such a manner as to shew that the party meant to give to the public what might fairly be called a new work, or whether, on the other hand, in robbing the former author of so much of his work, he acted as Lord Ellenborough expresses it, *animo furandi*."

The true doctrine deducible from these authorities seems to be expressed by Lord Erskine in *Mathewson and Stockdale*, that every man may take what is useful from the original work, and improve the materials already collected by others, if his mind is concerned in the compilation, endeavoring to make improvements and additions.

Coming to the more modern decisions, I find the same general principle established. In *Lewis vs. Fullarton*, 2 Beavan, page 6, the plaintiff was the publisher of a work called "*The Topographical Dictionary of England*;" the first edition was published in May 1831. The defendant commenced printing in June 1832, and completed in May 1834, a book called "*A New and Comprehensive Gazetteer of England and Wales*." Lord Langdale said: "On a comparison of the two books, it appears that a considerable portion of the matter, which is contained in the plaintiffs' work has found its way into the work of the defendant. Any man is entitled to write and publish a topographical Dictionary, and to avail himself of the labors of all former writers whose works are not subject to copyright, and of all public sources of information. Having gone carefully through all the articles commented upon in the argument and several others, I am of opinion that the defendants' work is, to a very considerable extent, a piracy of the plaintiff's copyright." See also *Campbell vs. Scott*, 11 Simons, p. 31.

In *Stevens vs. Wildy*, 19 Law Journal, New Series, Equity, page 190, it appeared that a legal work published by the defendant was, in a great measure, a copy of a book published by the plaintiff. The Vice-Chancellor said: "I think it is impossible to take up these two books, and not see that there has been very copious taking by the defendant. I do not think I am bound to go through the whole book. The law at present is in conformity with the old Roman law, which is, that if the defendant will take the plaintiff's corn, and mix it with his own, the whole should be taken to be the plaintiff's. The injunction ought to be granted."

In the case *Murray vs. Boyne*, 22 Law Journal Equity, page 457, on motion for an injunction to restrain the defendant David Boyne from continuing to sell a book called "A Guide Book to Switzerland," on the ground of its being a piracy from the plaintiff's book, entitled "A Hand Book for Travellers in Switzerland," Vice-Chancellor Kindersley, in the course of his learned and elaborate judgment, said: "I have now to consider how far Mr. Boyne's book is a piracy of anything contained in Mr. Murray's work published in 1838. A great number of instances was adduced for the purpose of shewing that Mr. Boyne had copied errors. That is the ordinary and familiar mode of trying the fact whether the defendant has used the plaintiff's book. I have not the slightest doubt that to some extent the defendant has used the plaintiff's work. It is obvious that in any road book, whether it be a mere mechanical road book, like the old English road books, or the more literary road books, which Mr. Murray's undoubtedly is, it is an extremely difficult thing to see how far the subject being the same, and the details necessarily, to a great extent, the same, the one has fairly or unfairly used the work of the other. I cannot say that the defendant's book is an unfair use of Mr. Murray's, and the injunction consequently must be refused."

In *Ferrolld vs. Houlston*, 3 Kay and Johnson, the plaintiffs were publishers of a work written by Dr. Brewer, called "*The Guide to Science*," the defendants the publishers of a work called "*The Reason Why*." Vice-Chancellor Wood said:—

"I take the illegitimate use as opposed to the legitimate use of another man's work on subject-matters of this description to be this: If, knowing that a person whose work is protected by copyright has, with considerable labor, compiled from various sources a work in itself not original, but which he has digested and arranged, you, being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources, and obtaining your subject-matter from them, avail yourself of the labor of your predecessor, adopt his arrangements, or adopt them with but a slight degree of colorable variation, and thus save yourself pains and labor—that I take to be an illegitimate use.

"I have not forgotten the case before Lord Cottenham, in which he speaks of the labor thrown upon the Court in analysing minutely cases of this description, and says 'that justice does not require such an analysis.' But it seems to me that, if I have been necessarily led to the conviction that there

has been a piracy, justice does require that I should not grudge any labor that may be requisite in order to ascertain how far the injunction should extend." The injunction was granted in this case.

See also *M'Neil vs. Williams*, 11 Jurist 344.

On a still more recent occasion in England, Vice-Chancellor Wood, in *Spiers vs. Brown*, reported in Volume 6 of the Weekly Reporter, page 352, examined the whole subject with great learning and assiduity. The plaintiff was the author of two dictionaries. The object of the suit was to restrain the defendant from publishing a dictionary compiled by M. Contanseau on the ground that he had pirated the plaintiff's books.

The Vice-Chancellor said that "the real issue which the Court was called on to decide was one of the most difficult ever presented to him, namely, as to how far this very considerable use of the work of another might be taken to be legitimate. Though a good deal had been here taken from the plaintiffs, yet a good deal of labor had been bestowed upon what had been taken. Upon the whole, he could not think the defendants had gone beyond what the Court would allow."

In *Emerson and Davis*, 3 Story 378, the learned American Judge Mr. Justice Story says: "Every author of a book has a copyright in the plan, arrangement, and combination of his materials, and in his mode of illustrating the subject, if it be new and original. Another man may publish another map of the same State by using the like means or materials, and the like skill and labor at his own expense."

Applying these principles and authorities to the present case, I have no difficulty in saying that the foundation of the plaintiff's case entirely fails. It is very desirable, in deciding cases like the one now under consideration, to act, whenever it is possible, upon broad principles, and not give effect to technical and nice distinctions. I have endeavored, without success, to find a case exactly circumstanced as this is, but this case falls clearly within the principle of the decisions of Vice-Chancellor Kindersley in *Murray vs. Boyne* and Vice-Chancellor Wood in *Spiers vs. Brown*, two of the cases having the most direct bearing on the present one. I find, from a close comparison of the works in question, in many respects the same arrangement and classification, and in some instances that the matter contained in the plaintiffs' book has been used by the defendants; but still I am of opinion that the defendants have not made an unfair or undue use of the plaintiffs' books. There exists a general resemblance, as both publications follow in the track of the old Directories.

No doubt the defendants sought for and obtained information from parties well qualified to assist them in the compilation of the Directory. The evidence adduced at the trial satisfied me that both the plaintiffs' and defendants' publications were compiled from materials common to the whole world. I have made a close comparison of Roussac's Directory for 1856 with that of Samuel Smith's Directory for 1855, and if the proprietors of the latter work had been minded to interfere with Mr. Roussac's, he could not well have complained, and the circumstance of his having been employed by Samuel Smith and Co. would have afforded no answer whatever. On the contrary, he, of all others, should have refrained from doing an act injurious to the interests of Samuel Smith or his legal representatives. Samuel Smith was the pioneer, years ago, in preparing a Bengal Directory. Mr. Roussac's connection with this publication commenced in 1854, and, according to his own statement, he was not a partner, but received profits for his services. Samuel Smith and Co. found all the funds; it was their risk. In 1855 Samuel Smith failed, and in 1856 Roussac commenced business on his own account. Mr. Sims continued to publish the Bengal Directory in the name of S. Smith and Co. till 1858. Roussac, in compiling his own Directory in 1858, availed himself of all the information collected whilst he was conducting S. Smith and Co.'s Directory; and now, in 1863, he claims a monopoly in a book which is, in a great measure, the result of the industry, enterprise, and capital which Samuel Smith and Co. bestowed in the preparation of their Directory for a quarter of a century.

The publication of Thacker's Directory may be prejudicial to the plaintiffs, but the question I have to determine is, has there been an invasion of the plaintiffs' legal or equitable rights? and I feel myself bound to make answer in the negative. The plaintiffs are now seeking to establish a monopoly in respect of a Directory compiled for the most part from information collected and published by other parties from an early period down to the present time. The classification and arrangement of the Bengal Directory and Annual Register of 1855 "on a new and improved plan" which was published by Samuel Smith is almost identical with that of the plaintiff. I have also looked through Smith's Directory for 1858, and I have no difficulty in saying that Roussac's is nothing more nor less than a new edition of Samuel Smith's book, with additions and improvements as it may appear. Mr. Roussac, at the hearing of the suit, strongly asserted his claim for protection in respect of the "Table of Distances" and the "Postage Rates," although it appears that the former was copied *verbatim et literatim*, with the exception of a few additions, from the

"*East India Calendar*," and that the latter was obtained from the Calcutta Post Office. Can it be seriously contended that for the future the Queen's subjects in India are not to be allowed to receive information on such subjects, except through the medium of Roussac's Directory? Of course, if the plaintiffs are entitled to restrain the defendants from selling their new Directory, the proprietors and publishers of many other useful publications will be placed at the mercy of the plaintiff; and, considering that from the beginning to the end of the plaintiff's Directory there is not a single line of original matter; the strongest evidence of "*piracy*" and "*servile imitation*" by the defendants or their agents could alone induce me to decide against the defendants' right to publish their Directory. I cannot help thinking that the establishment of a monopoly in such a work would cause considerable inconvenience to the public. As the population of the large and important cities in India increase, local Directories will be requisite, containing such information as "*Postal Distances*," "*Postage Rates*," a list of "*Calcutta Banks and other Institutions*." And yet if the plaintiffs are entitled to an injunction in this case, it would establish their right against all future publications of the same character, and, as regards the other Presidencies, the proprietors of Directories might be assailed for having pirated Roussac's Directory.

Upon these grounds I have felt myself bound to come to a decision in favor of the defendants. The only case that could for a moment induce a doubt in my mind is that of *Mathewson vs. Stockdale*, but that case, when properly understood, is in strict accordance with my present decision.

I cannot conclude my judgment without stating that I am very sensible of the valuable assistance rendered to me at the hearing of the suit by the learned Counsel, Mr. Bell, for the plaintiffs, and Mr. Doyne on behalf of the defendants.

Suit dismissed with No. 3 costs.

SREENAUTH MULLICK vs. BRIJOLALL PYNE AND DOORGAPERSAUD SEAL.

Suit to recover Rs. 5,000 on a Promissory Note—Interest at 48 per cent.—Pleas of Infancy and Fraud—Production of Receipt not mentioned in Written Statement—Act VIII: requires that Written Statements should be full and complete—Receipt, rejected, but afterwards admitted by consent—Receipt not for amount of money received, but for amount mentioned in Promissory Note—Decree for Defendant on the plea of Infancy.—Costs not allowed.

Mr. Bell and Mr. Paul for the plaintiff.

Advocate-General, Mr. Doyne, and Mr. Graham for the defendant, Doorgapersaud Seal.

The other defendant did not appear.

His Lordship delivered judgment as follows :—

Mr. Justice Wells.—This is a suit to recover Rupees 5,000 on a promissory note dated 17th January last, with interest at the rate of 48 per cent. per annum. The plaintiff on the record is Sreenauth Mullick, but it appears that the money which was advanced through him, and in his name, belonged to Chooneeloh Seal, who, though behind the scenes, is the real plaintiff. The defendants, Brijololl Pyne and Doorgapersaud Seal, who are both very young men, had been school-fellows, and were, at the time of the loan, on terms of close intimacy. It does not appear what Brijololl Pyne's means or expectations are, but Doorgapersaud Seal, though not the heir of a rich man, is connected by marriage with a wealthy family, his wife being the daughter and only child of the late Prawnkissen Mullick, and the niece of Baboo Shamchund Mullick. The case of the plaintiff, as disclosed in his written statement, is, that the loan was effected through Brijololl Seal and Jonardun Day, who, acting as brokers in the transaction, paid the money to the defendants, and received from them the promissory note upon which this action is brought. Brijololl Pyne has not appeared, but Doorgapersaud Seal has appeared ; and the case set up by him in his written statement is, that although he signed a paper, he did so, not knowing that it was a promissory note, but believing that it was a security for the other defendant to the East Indian Railway Company for the performance of a contract for the supply of coolies ; that he was an infant when he signed the paper ; and that no money was ever paid to him, or to Brijololl Pyne in his presence, upon that or any other occasion, by Brijololl Seal and Jonardun Day, or either of them. Doorgapersaud having pleaded infancy, as well as denied his liability on the ground that, if the paper which he signed was a promissory note, his signature was obtained fraudulently, the following issues were framed :—

1st.—Whether the plaintiff is entitled to recover from the defendants, or either and which of them, the sum of Rupees 5,000, or any and what part thereof.

2nd.—Whether the defendant, Doorgapersaud Seal, made the promissory note in the plaint mentioned.

3rd.—Whether the defendant, Doorgapersaud Seal, was an infant at the time of the making of the note.

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in the stamp is thicker than the writing on the paper on either side. It was assumed by the Advocate-General as proved that the stamp to the receipt was put on after the signature, and that the writing on the stamp, purporting to be part of the signature, was a forgery, and it was also suggested by him that no part of the signature was genuine; but the hypothesis that the whole signature is false is not only inconsistent with the hypothesis that the stamp was an afterthought, and was added after the signature had been forged, but is also opposed to the evidence of Doorgapersaud Seal, who has fully admitted the genuineness of the commencement and termination of the signature, and has only denied the portion written over the stamp. No stamp, he said, was on the paper when he signed it, but he neither professed nor seemed to be at all surprised at seeing for the first time a stamp upon it, and his demeanor in the box, coupled with the readiness with which he answered the questions put to him with reference to the stamp, have satisfied me that he was aware of its existence, but came prepared to deny all knowledge of it, knowing that any admission of an opposite nature would be inconsistent with his denial of the fact of any money having passed, of which the stamp would have been evidence. The denial of the stamp involves in it the charge that so much of the original signature as was written on the space covered by the stamp was erased, and that the stamp was afterwards put on with the writing now appearing on it. The stamp has been removed, and I have carefully examined the part with a very powerful glass, but I confess I have failed to discover the faintest trace of any writing. No acid could have been used to remove the writing without discoloring the paper, but no part of the paper is discolored, and there is no reason to suppose that any writing existed which it was necessary to remove. It is proved that the stamp was on the receipt before the signature, and that the signature, including the writing on the stamp, is in the hand of Doorgapersaud. Doorgapersaud in denying a part of the signature must have done so wickedly, and with intent to deceive the Court. It is painful to make such an observation with reference to a young man who is not only respectably connected and highly educated, but is just commencing life; but it is justified by the evidence, which is clear and distinct as to his conduct. I am satisfied that he signed the promissory note, knowing at the time what it was that he was signing. A discrepancy, not perhaps affecting the merits of the case, occurs between his written statement and his evidence. In his written statement he has stated that he was riding in company with Brijololl Pyne, when Brijololl Pyne took him to his house, and got him to sign a paper, whereas, according to his evidence, Brijololl went for him to his house, and brought him

thence. His attention was not called to this discrepancy, and he had therefore no opportunity of offering any explanation with regard to it ; but it is remarkable that there should be such a discrepancy.

Doorgapersaud has not only denied the promissory note and a part of his signature to the receipt, but he has also denied that any money passed ; and if his evidence upon this point is true, then the evidence of the plaintiff's witnesses must be false : but I cannot attribute perjury to them. Their evidence not only preponderates as being that of two against one, but is also the more reliable evidence, and has already influenced me to discredit the plaintiff upon a very important point. It is improbable that Doorgapersaud could have expected to establish a contradiction against the plaintiff and his witnesses in the absence of Brijololl Pyne ; but why is Brijololl Pyne absent ? Is it because he would have corroborated Doorgapersaud ? Or is it because he would have admitted the plaintiff's case ? Whose duty was it to call him ? Was it the duty of the plaintiff, who was a stranger to him, and was proceeding against him ; or was it the duty of Doorgapersaud, who was his intimate friend, and must have known the places he frequented, and where he was most likely to be found ? Doorgapersaud, knowing that Brijololl Pyne ought to be called as his witness, took out a subpoena against him, but it does not appear that any attempt was made to serve him. Indeed, Mr. Beeby has admitted that nothing was done beyond taking out a subpoena, and he has also admitted that no steps were taken to ascertain from Brijololl the real nature of the transaction, either at the time the advertisement was published or afterwards. No blame attaches to Mr. Beeby, as he could only act up to the instructions which he received.

I find that both the defendants made the promissory note, and that the defendant, Brijololl Pyne, is liable for the amount. The question whether Doorgapersaud Seal is also liable depends upon the question of infancy raised by the 3rd issue. It would not have been easy to have determined this question if it had rested solely upon the evidence of Shamchund Mullick, who stated not positively, but from recollection, that the wife of Doorgapersaud was with child at the early age of between nine and ten, when Doorgapersaud himself was not much older, being at the time between ten and eleven ; and to this statement he added the further statement that, among natives in both the upper and lower classes, it was not only a common occurrence for children at the ages mentioned to live as man and wife, but that he knew of instances of children having been permitted to live as man and wife even at an earlier age.

It became unnecessary to inquire as to whether it is possible for a girl to conceive at the age at which the wife of Doorgapersaud is said to have conceived, as it appeared from the evidence of the mother of Doorgapersaud, taken under a commission, as well as from the books produced, that Doorgapersaud, was of the age of eleven when he married; and according to this calculation, which I adopt, he must have been within some months of his majority when the promissory note was made. It is suggested that one of these books has the appearance of being too new to be genuine. If not genuine, it must have been fabricated for the purposes of this suit; and if fabricated for the purposes of this suit, why was it not produced on the first day of the hearing? It is now produced at the instance of the plaintiff, and but for him would not have been produced at all. It has been satisfactorily established that Doorgapersaud Seal was an infant at the time the promissory note was made, and I therefore find the 3rd issue in his favor. The plaintiff is entitled to a verdict as against the defendant, Brijololl Pyne, with No. 2 costs. The suit must be dismissed as against the defendant, Doorgapersaud Seal, but without costs. As a general rule, the costs would follow the result; but I consider that Doorgapersaud has, in consequence of the question raised by him under the 2nd issue, disentitled himself to any favor from the Court; and although he has succeeded on the plea of infancy, it is to say the least not very creditable in a young man to resort to such a plea in order to avoid the consequences of an act to which he had of his own free will, and in all probability for his own benefit, made himself a party shortly before attaining the age of legal liability.

In conclusion, I think it right to state that I believe the mother and Baboo Shamchund Mullick, the uncle of Doorgapersaud, would not have assisted him in his defence if they had known the real facts of the case. They have acted *bona fide* upon the representations of Doorgapersaud, now proved to be untrue, and are therefore free from all blame.

CUBIT SPARRHALL RUNDLE, &c. *vs.* THE SECRETARY OF STATE IN COUNCIL.

Sale of Waste Lands by Superintendent of Darjeeling—Payment of purchase-money, entry into possession, and improvement of lands by vendee—Refusal to execute deed of grant by Secretary of State in Council—Lands put up to auction and resold to original vendee at an advanced price—Plaintiff prays that such sale be declared null and void—Plea to the Jurisdiction—Under Acts XXIV. and XXV. Vic. alone Jurisdiction of High Court would be as extensive as Jurisdiction of late Supreme Court—These Acts must be taken with and controlled by Letters Patent—Under sec. 12 Secretary of State may be sued in such Court as may have jurisdiction in each particular cause of action—Secretary of State may be treated as Government itself—Universal presence of Government cannot be said to give every Court concurrent Jurisdiction in all cases against Government—Secretary of State in Council cannot be said to be within Ordinary Jurisdiction of this Court—The words “personally work for gain” were intended to give the Court Jurisdiction over individuals only—Officers of Government are subject to Jurisdiction of Mofussil Courts—Suits instituted there may be heard in High Court by way of appeal, or removed there for trial in the first instance as a Court of Extraordinary Original Jurisdiction.

Mr. Bell, Counsel for Plaintiff.

Advocate-General and Mr. Graham, Counsel for Defendants.

JUDGMENT.

Mr. Justice Wells.—This is a suit against the Secretary of State in Council for the specific performance of an agreement; and the facts, as stated in the plaint, are as follows: On or about the 31st of December 1861 the plaintiff applied to the Superintendent of Darjeeling for a grant of waste lands at Rinchington, in the Darjeeling territory, under the Resolutions of Government of the 7th of October 1861, published in the *Government Gazette* of the 9th of October 1861, and 500 acres of uncleared land at Rinchington were allotted to him at two rupees and eight annas per acre. In January 1862 the plaintiff paid the purchase-money, *viz.*, Rs. 1,250, to the Superintendent of Darjeeling, and entered into possession of the land, which he has improved by cultivation. Instead of executing a deed of grant to the plaintiff, the defendant advertized the land for sale in the *Government Gazette* of the 3rd December 1862; and though the plaintiff protested against such sale, the land was put up for sale by auction on the 5th of January 1863, when the plaintiff, under protest, and to prevent the land being sold to other parties, bid for the same the sum of Rupees 25 per acre, and, being the highest bidder, was declared the purchaser thereof. Upon these facts the

plaintiff prays that the last-mentioned sale be declared void, and that the defendant be restrained, by injunction, from proceeding to enforce payment of the Rs. 25 per acre so bid by the plaintiff, and be decreed to execute and deliver an instrument of grant of the land to the plaintiff, his assigns and heirs in perpetuity.

When the plaint was presented I had considerable doubt as to whether the Court had jurisdiction in this case; and I am glad that the question of jurisdiction has been raised by an issue in the nature of a plea to the jurisdiction. It is clear that the late Supreme Court would have had jurisdiction in a suit similar to this against the East India Company; for, by section 13 of the Charter establishing that Court, it is provided "that the said Supreme Court of Judicature at Fort William in Bengal may and shall have power and jurisdiction, and is hereby authorized to hear, examine, try, and determine, in manner hereinafter mentioned, all actions and suits which shall or may arise, happen, be brought, or promoted, upon or concerning any trespasses or injuries, of what nature or kind soever, or any debts, duties, demands, interest, or concerns, of what nature or kind soever, or any right, titles, claims, or demands of, in, or to any houses, lands, or other things, real or personal, in the several provinces or districts, called Bengal, Behar, and Orissa, or touching the possession, or any interest, or lien, in or upon the same, and all pleas, real, personal, or mixt, the cause of which shall or may hereafter arise, accrue, and grow, or shall have heretofore arisen, accrued, and grown, against the said United Company of Merchants trading to the East Indies, and against the said Mayor and Aldermen of Calcutta, at Fort William in Bengal," &c. And by Stat. 39 and 40 Geo. III., cap. 79, sec. 20, the jurisdiction of the Supreme Court was extended to the Province of Benares and other places to be annexed to the Presidency of Fort William. But the High Court, though substituted for the Supreme Court, has, in some respects, a more limited jurisdiction. This will appear from Acts XXIV. and XXV. Vic., cap. 104, and the Letters Patent establishing and constituting the High Court. Sections 9 and 10 of Acts XXIV. and XXV. Vic., cap. 104, relate to the jurisdiction and powers of the High Court. Section 9 provides "that each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty, and Vice-Admiralty, Testamentary, Intestate, and Matrimonial jurisdiction, Original and Appellate, and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may, by such Letters Patent as aforesaid, grant and direct, subject, however, to such directions and limitations as to the exercise of Original, Civil, and Criminal jurisdiction beyond the limits of the Presidency-towns as may be prescribed thereby; and,

save as by such Letters Patent, may be otherwise directed, and subject and without prejudice to the Legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts of the same Presidency established under this Act at the time of the abolition of such last-mentioned Courts."

Sec. 10 provides "that, until the Crown shall otherwise provide under the powers of this Act, all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay, respectively, over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act, establishing High Courts at Fort William, Madras, and Bombay, shall be exercised by such High Courts respectively."

And no doubt if Acts XXIV. and XXV. Vic., cap. 104, had stood alone, the jurisdiction of the High Courts would have been as extensive for all purposes as was that of the Supreme Court. But this Act must be taken together with, and as controlled by, the Letters Patent passed under the provisions therein contained, and by which it was intended to define and determine the jurisdiction of the High Court.

Sec. 11 of the Letters Patent is as to the local limits of the Ordinary Original Jurisdiction of the Court.

Sec. 13 is as to the Extraordinary Original Civil Jurisdiction of the Court, to which I shall have occasion to refer more particularly hereafter.

Sec. 12 empowers the Court "to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situate, or in all other cases if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within the local limits of the Ordinary Original Jurisdiction of the Court." It defines the nature and extent of the Ordinary Original Civil Jurisdiction of the Court; and, although it does not state negatively that the Court is not empowered to receive, try, and determine suits except as therein provided, yet that is plainly the intention and meaning of the section; and the Court cannot exceed the limits of the power given to it affirmatively, without assuming a jurisdiction which it was not intended that it should possess. The question then arises whether the words of the section are large enough to give the Court jurisdiction in the present case. But for the concluding prayer contained in the

plaint, that the defendant should be decreed to execute and deliver over an instrument of grant of the land in question, this could scarcely have been considered a suit for land ; and, assuming it to be a suit for land, it would not be necessary to consider whether the cause of action arose, or the defendant at the time of the commencement of the suit dwelt, or carried on business, or personally worked for gain within the local limits of the Ordinary Original Jurisdiction of this Court ; but it may, perhaps, be useful as a guide to the profession in future cases that I should state my views upon the different heads of jurisdiction.

The defendant is the Secretary of State in Council, and what is his position ? The Government of India was transferred to Her Majesty by secs. 21 and 22 Vic., cap. 106 ; and on its transfer it was considered necessary, for the better government of India, to establish a Council in England to be styled "the Council of India," of which Council the Secretary of State is the President. By section 65 of XXI. and XXII. Vic., cap. 106, it is provided "that the Secretary of State in Council shall and may sue and be sued as well in *India* as in *England* by the name of the Secretary of State in Council as a body corporate ; and all persons and bodies politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of *India* as they could have done against the said Company (East India Company) ; and the property and effects hereby vested in Her Majesty for the purposes of the Government of *India*, or acquired for the said purposes, shall be subject and liable to the same judgment and executions as they would, while vested in the said Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

It is clear that under this section the Secretary of State, as representing the Government of India, may sue and be sued as well in India as in England, which means not that he may sue or be sued in any Court irrespective of all questions of jurisdiction, but that he may sue or be sued in such Court or Courts as may have jurisdiction in respect of each particular cause of action.

It appears, upon the face of the plaint, not only that the land in question is situated out of the local limits of the Ordinary Original Jurisdiction of the Court, but also that the cause of action arose out of such local limits ; but it was contended on behalf of the plaintiff that the defendant is subject to the jurisdiction of the Court under the other heads of jurisdiction. Individually, the defendant cannot be said to be either dwelling, or carrying on business,

or personally working for gain within the local limits of the Ordinary Original Jurisdiction of this Court; but the defendant is proceeded against, not as a private individual, but as the authorized representative of the Government, and as such he must, for all purposes connected with the present question, be treated as being in the same position as the Government itself. And what is the position of the Government? The Government of India is represented in this city, which is its principal seat, by the Governor-General, or, in his absence, by the President in Council, and throughout its extensive territories by its various officers, civil and military, in every grade of official rank. It may therefore be said to be present everywhere, and to be constructively dwelling in each and every place at the same time. But it cannot be allowed that this universal dwelling can give a plaintiff the right to elect the forum in which to sue the Government, or give every Court of Justice in India concurrent jurisdiction in all cases against the Government. Such a rule would be one-sided in its operation, and would place the Government at a disadvantage which, in the case of a private individual, would amount to an evil of the greatest magnitude. The Government, though in a certain sense ubiquitous, cannot be said to be dwelling everywhere, so as to give every Court in the country jurisdiction in every cause of action wheresoever it may have arisen; but it must be understood to have, as regards each cause of action, a local dwelling, that is, a dwelling in the place where the particular cause of action may have arisen, as distinct from every other place; and in this view the Government, or the Secretary of State in Council as representing the Government, cannot be said, as regards the cause of action in the present case, to be dwelling within the limits of the Ordinary Original Jurisdiction of this Court, as it is admitted that the case of action arose out of such limits.

Then, can the Secretary of State in Council be said to carry on business or work for gain within the local limits of the Ordinary Original Jurisdiction of the Court? It is true the business of the Government is carried on as well within the local limits of the Ordinary Original Jurisdiction of the Court as elsewhere; and it is equally true that the Government obtains revenue, to a large amount, from various sources within such local limits; but the business so carried on, and the agency employed in collecting the revenue so obtained, cannot be said to be business carried on, and work done for gain, within the meaning of the 12th section of the Letters Patent. The words "*carry on business, and personally work for gain,*" do not refer to an institution like the Government; and the words "*personally work for gain*" were

intended to give the Court jurisdiction over individuals who, though dwelling out of the local limits of the Ordinary Original Jurisdiction of the Court, might be personally working for gain within such local limits.

It now becomes necessary to consider whether the Court has jurisdiction under the Charter of the Supreme Court already referred to. That Charter is repealed only so far as it is inconsistent with Acts XXIV. and XXV. Vic., c. 104, and with the Letters Patent constituting this Court. The last section of the Letters Patent provides "that from and after the establishment of the said High Court of Judicature at Fort William in Bengal, so much of the aforesaid Letters Patent granted by His Majesty King George III. as is inconsistent with the recited Act and with these Letters Patent shall cease, determine, and be utterly void to all intents and purposes whatsoever." If the 13th section of the Charter is still in force, then the Court has jurisdiction in the present case, and cannot decline to exercise it; but whether the 13th section of the Charter is in force depends upon the question whether it is consistent or inconsistent with the Letters Patent. In my opinion it is inconsistent with the Letters Patent. The Letters Patent, as regards the ordinary jurisdiction to be exercised by the Court, was intended to be received in substitution of the Charter, and not as supplementary to it, inasmuch as it confers, with one exception, no new powers, but the same powers in a new and abridged form. If, therefore, it was not intended that it should supersede the Charter, it is impossible to conceive with what object section 12 of the Letters Patent was framed. The Criminal, the Testamentary and Intestate, and the Admiralty jurisdictions exercised by the Supreme Court on its Crown, Ecclesiastical and Admiralty sides, and the Vice-Admiralty jurisdiction exercised by the Vice-Admiralty Court, are all conferred on the High Court in express terms by sections 21, 31, and 34 of the Letters Patent; and if it had been intended to give the Court the same extent of Civil Jurisdiction as was exercised by the Supreme Court on its Equity and Plea sides, it is not likely that such an intention would have been left unexpressed.

The argument that section 12 of the Letters Patent is not applicable to the Government might have had force if it could have been shewn that the Mofussil Courts had no jurisdiction in suits against the Government, but there can be no doubt that these Courts have jurisdiction. By Regulation III. of 1793 the officers of Government employed in the collection of the revenue, the provision of the Company's investment, and all other financial or commercial

concerns of the public were made amenable to the Courts for acts done in their official capacity in opposition to the Regulations, and the jurisdiction of the Courts was extended to suits against the Government itself; and the case of *Wasek Uli Khan vs. The Government*, reported in the *Sudder Dewanny Reports*, vol. 6, p. 110, was cited in confirmation of the competency of the Courts to entertain suits against the Government. Regulation III. of 1793 having, however, been repealed by Act X. of 1861, it was contended by Mr. Bell, on behalf of the plaintiff, that the jurisdiction of the Courts was reduced to its original limits, and no longer extended to the Government or its officers. But in my opinion this argument is untenable. Regulation III. of 1793 was repealed after Act VIII. of 1859 had come into operation, and in consequence of it; the provisions of Act VIII. of 1859 having rendered Regulation III. of 1793 unnecessary. Act VIII. of 1859 was originally intended for the Courts of Civil Judicature not established by Royal Charter; and the very first section gives the Courts a jurisdiction wide enough to include the Government and its officers. This section is as follows: "The Civil Courts shall take cognizance of *all* suits of a civil nature, with the exception of suits of which their cognizance is barred by any Act of Parliament, or by any Regulation of the Codes of Bengal, Madras, and Bombay respectively, or by any Act of the Governor-General of India in Council." The word "*all*" is of the most comprehensive nature, and admits of no exception being made in favor of either the Government or its officers. And it was never intended that the Government or public officers should be exempt from the jurisdiction of the Courts; for not only does the Act give the Courts a general jurisdiction, but it specially and particularly prescribes the mode in which that jurisdiction is to be exercised in suits against the Government and public officers. Taking section 1, which gives the Courts jurisdiction, together with sections 67, 68, 69, 70, 71, and 201, which prescribe the course of procedure in suits against the Government and public officers, there can be no doubt or uncertainty as to what was intended by the Legislature.

Although I must hold that the High Court cannot take cognizance of this suit in the exercise of its Ordinary Original Civil Jurisdiction, yet it is satisfactory to know that the suitor has not only the right of appeal to the High Court from the subordinate Courts under its supervision, but may, under special circumstances, have a suit properly instituted in the lower Court removed for trial to this Court as a Court of Extraordinary Original Jurisdiction. This power to remove suits is given to the High Court by section 13 of the Letters Patent, which provides "that the said High Court of Judicature at

Fort William in Bengal shall have power to remove, and try and determine, as a Court of Extraordinary Original Jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of parties to that effect, or for purposes of justice, the reasons for so doing being recorded in the proceedings of the said High Court."

It will be open to the plaintiff in this case, after he has brought his suit in the proper Court at Darjeeling, if so minded, to apply to this Court to remove and determine the suit as a Court of Extraordinary Original Jurisdiction; and it will not be necessary to apply adversely, as the Advocate-General has intimated that the defendant will concur in such an application if made.

BUNGSEEDHUR MULICK, &C. *vs.* THE CALCUTTA AUCTION
COMPANY, LIMITED.

Suit for Specific Performance—Agreement for a Lease of Premises—Draft sent to defendant for approval—Defendant refuses to execute—Portion of Premises previously let by plaintiff on lease for 2½ years to third party—Conflicting evidence as to disclosure or non-disclosure of this Lease—Balance of evidence in favour of non-disclosure—Possession taken by the defendant of a portion of the Premises—Specific Performance not decreed in favour of a party who is incapable of performing his own part of the agreement—Suit dismissed with costs.

Mr. Bell and Mr. Eglinton for the Plaintiff.

Mr. Wilkinson and Mr. Lowe for the Defendant.

Mr. Justice Wells.—This is a suit instituted by the plaintiffs, as the trustees, under a deed executed to them by Buden Chunder Roy, deceased, of certain premises, No. 13 and No. 14, Loll Bazar, in Calcutta.

The plaint states that the defendants by two letters, dated respectively the 26th and 29th April 1862, entered into an agreement for a lease of the premises 13 and 14, Loll Bazar, and that, according to the terms expressed in the said letters, a fair draft of a lease was drawn up and sent to the defendants for approval, but that the defendants refused and still refuse to execute the lease. The two letters are as follows :—

Calcutta, 26th April 1862.

R. LYALL, ESQUIRE,

Manager of the Auction Co., Limited.

DEAR SIR,

After some conversation with Mr. Behrends, one of your Directors, we have agreed to let the premises Nos. 13 and 14, Loll Bazar, to the Calcutta Auction Company for a term of seven years, commencing on the 1st of June next, at a monthly rent of Rupees nine hundred. It is understood that, so long as Messrs. Fornaro and Huni retain possession of that portion of the premises they now occupy, the rent payable by the Auction Company is to be seven hundred rupees a month.

We have instructed our Solicitor, Mr. R. M. Thomas, to forward a draft of lease to the Company's Solicitors, Messrs. Lyons and Dodd, and shall,

pending the preparation of the same, feel obliged by your reply accepting the terms above stated.

We are,

Yours faithfully,

(Sd.) M. S. DUTT,

(„) S. N. ROY,

Trustees of late Baboo B. C. Roy.

MESSRS. MUDDOOSOODUN DUTT AND SREENAATH ROY.

DEAR SIRs,

In reply to your note of 26th instant, I am directed by the Directors of this Company to agree to the terms enumerated therein, *viz.*, for seven years from 1st June next, at a monthly rent of Rupees 900 per month, but so long as Messrs. Fornaro and Huni occupy a portion of the premises, the rent payable by the Company to be Rs. 700 monthly only.

Yours faithfully,

(Sd.) ROBT. LYALL,

For Manager.

Calcutta, 29th April 1862.

The suit is for a specific performance of the agreement contained in these letters by execution of a lease.

The following issues were settled, *viz.* :—

1. Whether the plaintiffs disclosed to the defendants, at the time of entering into the agreement mentioned in the plaint, the fact that a portion of the premises comprised in the lease mentioned in the plaint were in possession of Messrs. Fornaro and Huni under an agreement for a lease for two and-a-half years.

2. Whether the plaintiffs were bound to execute a lease of the said premises for a term of seven years when requested.

3. Whether it was agreed between the plaintiffs and the defendants that the plaintiffs should give the defendants possession of the whole of the premises in question before the execution of the lease by the plaintiffs.

4. Whether the plaintiffs were ready and willing to execute the lease on possession being delivered of the whole of the premises.

5. Whether the plaintiffs are entitled to a specific performance of the agreement mentioned in the plaint.

It appears from the evidence adduced in the case that as early as January 1862 the defendants, through Mr. Behrends, one of the Directors, communicated with Muddoosoodun Dutt respecting the premises. At this time a portion of the premises had been let to Messrs. Fornaro and Huni under an alleged agreement for a lease for two and-a-half years.

The plaintiff, Muddoosoodun Dutt, has stated that when he entered into treaty with Mr. Behrends for a lease of the premises, the fact of Messrs. Fornaro and Huni having an interest, as tenants, in a portion of the premises as well as the nature and extent of their interest, was mentioned to Mr. Behrends.

Under these circumstances, the plaintiffs contend that they are entitled to have a lease executed by the Calcutta Auction Company.

The defendants say that they entered into the agreement under the impression that the plaintiffs would be able, within a short time, to remove Messrs. Fornaro and Huni from the premises, and that as the plaintiffs have been prevented by their own conduct from removing Messrs. Fornaro and Huni, they are not entitled to a specific performance of the agreement.

On behalf of the plaintiffs the chief point made by Mr. Bell was that the plaintiffs having disclosed to Mr. Behrends, at the time the negotiation was going on, the nature and extent of Messrs. Fornaro and Huni's interest in the premises, the defendants entered into the agreement with a full knowledge of all the circumstances, and are consequently bound to execute a lease, unless it can be shewn that the plaintiffs acted fraudulently. On the other hand, it was argued that at the time Mr. Behrends entered into the agreement, he was under the belief that the plaintiffs possessed the power of turning out Messrs. Fornaro and Huni, it having been represented to Mr. Behrends that they were only tenants at will.

It is not necessary for me to determine the legal rights of the plaintiffs and Messrs. Fornaro and Huni, as I am of opinion from the whole evidence that Baboo Muddoosoodun Dutt did not disclose to Mr. Behrends what had taken place between the plaintiffs and Messrs. Fornaro and Huni. Muddoosoodun Dutt did not intend to misrepresent what really did take place between himself and Mr. Behrends, but his recollection was very imperfect.

It is true the defendants, to a certain extent, adopted the contract, for they entered and remained upon the premises for some time; and there was a stipulation that out of the rent mentioned a proportionate abatement

should be made in respect of the premises in the occupation of Messrs. Fornaro and Huni. But where the manner of obtaining an agreement is not strictly just and regular, a Court of Equity will not decree a specific performance, although the agreement be in part executed.

It was strongly contended on behalf of the plaintiffs that the letter of the 10th February, mentioning the existence of a lease of a portion of the premises to Messrs. Fornaro and Huni, must be treated as a specific notice to Mr. Behrends of the nature and extent of Messrs. Fornaro and Huni's interest in the premises.

Mr. Behrends stated in his evidence that when the letter of the 29th of April was written he expected to get the whole of the premises within three months, and I am satisfied that Muddoosoodun Dutt did not shew to Mr. Behrends the letters written by Fornaro and Huni to the plaintiffs. I am certain that if the following letter, dated April 10th, 1862, from Messrs. Fornaro and Huni to the plaintiffs, had been shewn to Mr. Behrends, he would not have recommended the defendants to take the premises on the terms mentioned in the letter of the 26th April :—

Calcutta, 10th April 1862.

To

BABOOS MUDDOOSOODUN DUTT AND SREENAUTH ROY,
Trustees of late Baboo Buden Chunder Roy.

DEAR SIRs,

With reference to your letter to us, dated the 5th instant, we altogether deny that anything which has taken place between yourselves and ourselves can be construed into a withdrawal of your letter of the 18th January last; we have never either expressly or impliedly acceded to the withdrawal of that letter. On the contrary, we accepted the tenor of it unconditionally, and in pursuance of such acceptance took possession of the premises on the 1st of March, the day named for the commencement of the tenancy, and we are still in possession. Will you therefore kindly send us the requisite lease for signature.

We are,

Dear Sirs,

Yours faithfully

FORNARO AND HUNI.

The two cases cited by Mr. Bell—*Vigors vs. Peke*, 8 Clarke and Finnelly 650, and *Chapman vs. Shillito*, 7 Beavan—are authorities for the doctrine stated by Lord Langdale in his judgment in the latter case, “that in cases in which, upon entering into contracts, misrepresentations made by one party have not in any degree been relied on by the other party, if the party to whom the representations were made himself resorted to the proper means of verification before he entered into the contract, or, if the means of investigation be at hand, and the attention of the party receiving the representation be drawn to them, the circumstances of the case may be such as to make it incumbent on a Court of Justice to impute to him a knowledge of the result.” I think in the present case that Mr. Behrends so completely understood that the plaintiffs could turn out Messrs. Fornaro and Huni as to consider that it was not incumbent upon him to ascertain the precise nature of Messrs. Fornaro and Huni’s tenancy. Mr. Behrends and Mr. R. Lyall have both stated most distinctly that the agreement would not have been entered into, if they had really understood that Messrs. Fornaro and Huni had a right of occupation for two and-a-half years. The following letters shew conclusively the views entertained by both the plaintiffs and Messrs. Behrends and Lyall:—

Calcutta, 10th February 1862.

G. F. BEHREND, ESQUIRE.

MY DEAR SIR,

Agreeably to your instructions, I have proposed to Mr. Huni to give up his lease for the portion of the premises 13 and 14, Lall Bazar. The arrangement cannot be completed without allowing him some time, say about 2-or 3 months, to which I hope you will have no objection.

Yours faithfully,

(Sd.) M. S. DUTT.

April 10th, 1862.

MY DEAR MUDDOO,

Mr. Lyall finds we can manage for a short time with that portion of the premises in Lall Bazar still unlet; so you had better give Mr. Thomas your instructions to prepare a draft for a lease, which can be forwarded to Messrs. Lyons and Dodd. Our occupancy cannot commence before 1st June next, as we have one month’s notice to give.

Yours very truly,

(Sd.) G. F. BEHREND.

The use of the word "lease" did not necessarily convey to Mr. Behrends' mind that Messrs. Fornaro and Huni had an agreement for a lease for so long a term as two and-a-half years. A lease is a contract between parties by which the one conveys any lands or tenements to the other for life, years, or at will. A tenancy-at-will takes place when the demise is for no certain term, but to continue during the joint will of both parties, and no longer; and I must say, after a careful consideration of the parol and documentary evidence, that Mr. Behrends throughout considered that under the agreement between the plaintiffs and Messrs. Fornaro and Huni, they could be turned out at any moment by the plaintiffs.

I cannot say in this case that there existed equal knowledge of facts and equal means of ascertaining them. It is clear that even now the plaintiffs are not in a position to carry out their undertaking; and equity will not decree a specific execution upon an agreement in favor of a party who is not competent to perform his part of the agreement.—*Wood vs. Griffith*, 1 Swanston 54, *Mortlock vs. Buller*, 10 Ves. 316; see also *Knatchbull vs. Grueber*, 1 Madd. 153. The ability of the plaintiffs to make the lease depends on the extent of the demise to Messrs. Fornaro and Huni.

To entitle a party to a specific performance, he must shew that he has been in no default, and that he has taken all proper steps towards the performance of the agreement on his own part.—*Story's Equity Jurisprudence*, Vol. II., p. 87. Courts of Equity will not interfere to decree a specific performance, except in cases where it would be strictly equitable to make such a decree; for instance, when the contract is founded on misapprehension, undue advantage, or mistake.—*Remberley vs. Jennings*, 6 Sim 340; *Greenaway vs. Adams*, 12 Ves. 399.

The plaintiffs are in the same position as a vendor who has contracted with two different parties for the sale to each of them of the same estate, and in such cases the Court will *prima facie* enforce the contract first made. Muddoosoodun Dutt, acting on the advice of his Solicitor, considered himself in a position to treat Messrs. Fornaro and Huni as tenants at will, and that feeling, I doubt not, influenced him in entering into the arrangement with the Auction Company. It has turned out otherwise, and the plaintiffs are clearly not entitled to a specific performance of the agreement against the present defendants.

Suit dismissed with No. 2 Costs.

JOHN BORRODAILE AND ANOTHER vs. CHAINSOOK BUXYRAM.

Purchase of Cotton—Action for damages on account of non-delivery—How far a Party is bound by the acts of a Broker—Repudiation of a contract made by a Broker—Broker sometimes agent of both parties—Primarily agent of the party originally employing him—Becomes agent of the other party when the contract is definitely settled as to its terms between Principals—Sec. 17, Statute of Frauds, does not affect Hindoo or Mohomedan Defendants.

Mr. Bell and Mr. Eglinton for the Plaintiffs.

Mr. Clarke and Mr. Doyne for the Defendant.

Mr. Justice Wells.—This is an action brought by J. Borrodaile and Co. against a firm carrying on business as merchants under the style and firm of Chainsook and Buxyram. The parties who represent the defendants are Mohunlall and Deepchand. The plaintiffs claim to recover Rupees 11,550 for damages sustained by them by reason of the non-delivery of 1,100 maunds of Hungul Ghaut cotton purchased from the defendants, and Rupees 101 for earnest-money paid upon such purchase.

The following issues were framed and recorded :—

1. Whether the cotton in question was sold by the defendants to the plaintiffs in the manner stated in the plaint.
2. Whether the cotton was delivered, and, if not delivered, whether any and what damage has been sustained by reason of the non-delivery thereof.
3. Whether any memorandum in writing under the Statute of Frauds is necessary, the defendants being Hindoos.
4. Whether any memorandum in writing for the sale of the cotton was made and signed by the parties to be charged by the contract.
5. Whether the plaintiffs have accepted any part of the cotton, or given anything in earnest to bind the bargain or in part-payment.

It appears that on the 11th of July the plaintiffs purchased from the defendants, through the intervention of Hursook, a broker, 300 bales of Banda cotton. This is an admitted fact. On the following day, Chunderseekur Mookerjee, the plaintiffs' Banian, went with Hursook to the screw-house at Sulkea with reference to the screwing of the 300 bales; while there, in consequence of Chunderseekur finding that there was other cotton in the godowns, a conversation took place between him and Hursook as to the purchase of 1,100 maunds.

On this part of the case Chunderseekur says: "I saw the defendant Mohunlall at the time the cotton was inspected. He was present when the bales were cut open. I took a sample, and communicated with Mr. Struthers on the subject." Hursook says: "The defendant was present. He had other cotton besides the 300 bales. Chunderseekur took a sample." This confirms the evidence of Chunderseekur both as to a sample having been taken, and as to the defendant having been present at the time.

With respect to the bargain, Hursook says: "Mohunlall said to me, 'It is very good cotton; close the matter.' That was at the time the sample was taken. I then said to Chunderseekur: 'The article is very good; take the sample and close the bargain.' Chunderseekur told me to come to the office. I went to the office, and a bargain was made at 19-8 per maund for 1,100 maunds of the cotton, of which a sample had been taken in the morning. I received money as earnest-money, and returned it again to Chunderseekur. I afterwards received it again, and credited it in my books in the name of the defendants. After I had made the contract, I saw Mohunlall. I told him that I had made the contract at 19-8 per maund, and had brought the contract and earnest-money. He said: 'If the moon changes its course, I will deliver the article; have I ever before signed?' * * * I made the contract about 3 or half past 3, and I went to Mohunlall about 4. * * * The sample was approved of, and the bargain made; the price was to be 19-8; that was on the same day on which we went to inspect the 300 bales. I did not give a contract for the 1,100 maunds, because the owner positively said he would deliver the goods, and said I could enter it in my books. The contract was made at about half past 3. I went to the defendant's guddy about 4 o'clock. Mohunlall agreed to the price. He said '19-8 is the price, 2 annas more or less: whatever is conducive to my welfare, that do.'"

The evidence of Mr. Struthers, a member of the plaintiffs' firm, is important as confirming the evidence of the Banian and the Broker as to a sample having been taken. He says: "I remember Chunderseekur bringing me a sample of cotton. I think that was on the 12th of July. I approved of the sample, and returned it to Chunderseekur."

As the sample was taken on the 12th of July, it must have related to cotton other than the 300 bales which formed the subject of a contract already concluded.

It will not be necessary to refer again to Mr. Struthers's evidence, except as to the fact of the purchase-money having been tendered.

Hursook goes on to say: "I signed a contract in respect of the 300 bales. I was ready to sign a contract as to the 1,100 maunds, but the screws were at work, and a large quantity of the article had come into possession."

The reason given by Hursook for not signing the second contract is not satisfactory; but if his testimony is worth anything (and it is corroborated in several particulars), it would appear that Chunderseekur took a sample in the presence of Mohunlall; that a contract was entered into, and that Mohunlall approved of the contract after the terms had been mentioned to him, and promised, in very impressive language, to deliver the cotton. And who was Hursook in the matter? He professes to have acted as a broker; and it is admitted that he was often employed in that capacity by the defendant's firm. A broker is primarily the agent of the party who first employs him; and a very important principle is involved as to how far a party is bound by the acts of a broker. We have in the present case a principal repudiating a contract made by a broker who had often before been employed by him, and had been employed by him only the day before in negotiating a contract with the same parties, *vis.*, the contract as to the 300 bales. This alone was sufficient to induce the plaintiffs to recognize, in its fullest extent, his agency in reference to a subsequent contract made immediately after, the subject of which was also cotton. It is true the conduct of a broker must be carefully examined, but in the present case I see nothing in the conduct of Hursook suggestive of *mala fides*; and this being so, the defendants must be held to be bound by their acts, unless they can show clearly and conclusively that they had no authority, or that he exceeded their authority. This is the principle I would apply to this case: it is a sound principle and one specially adapted to a commercial community whose transactions are to a large extent conducted through brokers acting between principals, who in many instances are behind the scenes, unknown to each other. It is a settled rule that a broker is for some purposes treated as the agent of both parties: primarily he is deemed merely the agent of the party by whom he was originally employed, and he becomes the agent of the other party only when the bargain or contract is definitively settled as to its terms between the principals. See *Story on Agency*, p. 30, sec. 31, and *Henderson vs. Barnwell*, Y. and Jerv. 395.

Now, what was the position of Hursook in relation to the parties? He was a stranger both to the plaintiffs and their Banian up to the 11th of July, when the first contract as to the 300 bales was made; or, in other words, he was unknown to them till just the day before the date of the alleged contract as to

the 1,100 maunds. He was a countryman of the defendants, and had been employed by them for about a year and a-half in cotton transactions. His interests, therefore, would naturally lead him to take part with the defendants against the plaintiffs; and his evidence is valuable in proportion as it is opposed to his own interests, and if given, as it has been, in favor of the plaintiffs, it must be taken strongly against the defendants.

Chunderseekur says that he and Mr. Struthers were present at the interview between Mr. Abbott, the plaintiff's solicitor, and Mohunlall when the tender was made, and describes what passed upon that occasion; and if his evidence is reliable, it tallies with and supports the plaintiffs' case.

Hursook, speaking of the same interview, says: "Mohunlall was not present. Deepchand was, and he said to the Sahib (Abbott) as well as myself: 'Give the price, and I will give the goods.' He said this both with respect to the 300 bales and the 1,100 maunds. *** He said: 'Pay me down the money at once.' The Sahib said: 'I will pay for as many bales I receive delivery of.'"

Now this is inconsistent not only with the evidence of Mr. Abbott, but also with the evidence of Mr. Struthers and the Banian as to the tender: if true, it would go to show that there was, in fact, no real difference between the parties, and that the only question between them was as to the time of payment; the one party insisting upon obtaining delivery before payment, and the other upon obtaining payment before delivery. But in that view of the case, why was this action brought? As there is a direct conflict of testimony, it may be as well to look at the terms of the correspondence that took place. On the 22nd of July Messrs. Abbott and Carruthers wrote to the defendants:—

"Sirs,—On the part of Baboos Callydoss Dhur and Chunderseekur Mookerjee, we hereby tender to you the sum of Rupees nineteen thousand nine hundred and ninety-seven, fifteen annas, and three pies (Rs. 19,997-15-3) in Bank Notes and cash, as per memo. at foot hereof, in respect of the price of three hundred (300) bales of good Banda cotton under your contract for sale thereof to them, dated the eleventh instant."

On the same day they wrote a second letter:

"Sirs,—On the part of Baboos Callydoss Dhur and Chunderseekur Mookerjee, we hereby tender to you the sum of Rupees twenty-one thousand four hundred and fifty (Rs. 21,450) in Bank Notes and cash, as per memo. at foot hereof, in respect of the price of 1,100 maunds of Hungul Ghaut cotton under your contract for sale thereof to them."

On the 23rd of July they again wrote :

"Sirs,—With reference to our letters to you of yesterday's date, written on behalf of Baboos Callydoss Dhur and Chunderseekur Mookerjee, and tendering to you the sum of Rs. 19,997-15-3 and Rs. 21,450 in respect of the price of 300 bales of Banda cotton and 1,100 maunds of Hungul Ghaut cotton under your contract for sale, and which tenders you refused, we are now instructed to demand from you the immediate delivery to our clients of the said cotton, and to give you notice that unless the cotton is delivered to them at once, proceedings will be taken against you in the High Court without any further reference to you."

On the 23rd they received the following letters from Messrs. Temple and Fenn, the defendants' Attorneys :

"Dear Sirs,—Lallahs Chainsook Buxyram have handed us your letter of yesterday's date, purporting to tender to them the sum of Rs. 19,997-15-3 in respect of 300 bales of Banda cotton contracted to be sold by them to your clients, Baboos Callydoss Dhur and Chunderseekur Mookerjee, and in reply we are instructed to state that our clients authorised a broker, named Hursook, to procure a purchaser for 300 bales of cotton, and the said Hursook informed them that he had got a purchaser for the said 300 bales at the price or sum of Rs. 19,997-15-3, to be paid prior to delivery being made."

Our clients are wholly unacquainted with yours, but they presume that they are the purchasers with whom the said Hursook entered into the contract for sale. Our clients are quite willing to make delivery of the 300 bales of cotton agreed to be sold to the real purchasers upon receiving payment for the same, but not before. Your serving writer declined to pay the money which your letter purported to tender, and we have now to inform you that, unless your client pay the said sum, and take delivery of the said cotton within two days from this date, our client will treat the contract as cancelled. The cotton is at Sulkeah, and your clients, if they intend to complete their purchase, can send the money and take delivery from our clients at Sulkea."

"Dear Sirs,—Lallahs Chainsook Buxyram have handed us your letter of yesterday's date, written on behalf of Baboos Callydoss Dhur and Chunderseekur Mookerjee, and tendering to our clients Rs. 21,450 in respect of 1,100 maunds of Hungul Ghaut cotton under an alleged contract for sale thereof by our clients with yours, and in reply thereto we are instructed to state that our clients know nothing of any such contract, and that your clients have made some mistake in applying to them in respect thereof."

The tender made by Messrs. Abbott and Carruthers in their letter of the 22nd of July was an *unconditional* tender; and is it to be believed, that Mr. Abbott, in a subsequent interview, made a verbal tender different in its terms from that already made in writing. He has denied having done so, and his denial is not only consistent with probability, but is borne out by Chunderseekur and Mr. Struthers.

It appears that no mention was made in the first letter of the 1,100 maunds; but Mr. Abbott has accounted for the omission by saying that at the time he wrote that letter he had some doubts as to the validity of the second contract with reference to the Statute of Frauds.

Mohunlall in his first letter only speaks of 300 bales, whereas he has admitted in his evidence that he sold 379 bales. Both sides rely upon that letter: Mr. Bell on the ground that it is inconsistent with the alleged sale of 379 bales, and Mr. Clarke on the ground that it implies an absolute ignorance of the contract on the part of the defendants; and it is urged on the part of the defendants, that it is highly improbable that Deepchand should have made admissions prejudicial to the defendants' case at the very time that Mohunlall was instructing his Attorneys to write that letter.

It is necessary to see what really took place at the interview. According to Mr. Abbott's evidence, he thought Mohunlall was present as well as Deepchand, but he was unable to point him out; and it may, I think, be taken for granted that he mistook some other person for him. Mr. Abbott says: "Deepchand was the man who addressed me first and chiefly." Deepchand himself admits that he spoke to Mr. Abbott; and I have no doubt that he it was who, in the absence of Mohunlall, made the statements alleged to have been made on behalf of the defendants. Mr. Abbott also says: "I asked him if it was not a shameful thing that he should repudiate the contract. He said he was willing to deliver the cotton to Hursook, but knew nothing of my clients in the matter. He, two or three times, sat down to write out a delivery order to Hursook. He wrote it partially; I did not read it. That statement of his was applicable to the 1,100 maunds as well as the 300 bales. I gave him distinctly to understand that the money tendered was in respect of the 1,100 maunds as well as the 300 bales."

It may be difficult to reconcile the conduct of Deepchand with the course of action taken by Mohunlall contemporaneously; but it is probable that the former was unable to withstand the sudden pressure put upon him by Hursook, the friend and broker, and was surprised into saying and doing what now, with

reference to the nature of the defence, he finds it expedient to deny. And here it is important to notice the discrepancy which occurs between Mohunlall's evidence as to his having sold 379 bales and his instructions to his Attorneys, in which he made mention of only 300 bales. It may be that at the time it escaped his recollection that more than 300 bales had been screwed and marked, or it never occurred to him how such a fact might be used against him; but afterwards, having remembered the circumstance, or considered its probable effect, he altered his case with a view to rebut the presumption that the number of bales in excess of 300 formed part of another contract. It was clearly an afterthought which led him to shift his ground.

Chunderseekur confirms Mr. Abbott in his account of what took place, and deposes to the fact of the tender and to Hursook's indignation at the repudiation of the contract. But was a tender really made? Deepchand admits that Mr. Abbott said: "Take the money and give the cloth;" but he says: "Mr. Abbott did not put down any money: he took out no money before me; he showed me no money; I saw no Bank Notes. I did not know that Mr. Abbott had brought Bank Notes." He also says: "When Mr. Abbott came I was not aware that he claimed 1,100 maunds as well as 300 bales." And he not only denies having written anything in Mr. Abbott's presence, but contradicts him in some other particulars. But am I to believe him in preference to Mr. Abbott, Mr. Struthers, Chunderseekur, and the broker? Is the evidence of so many respectable witnesses to be set aside as worthless upon the solitary testimony of a person in the employ of the defendants? I have no hesitation in coming to the conclusion that the evidence of Mr. Abbott, confirmed and supported as it is, "must be received as true;" and that the tender has been satisfactorily proved on the part of the plaintiffs, and insufficiently answered on the part of the defendants. And if the fact of the tender is established, it affords cogent evidence confirmatory of the contract as to the 1,100 maunds; for it shows that when Chunderseekur took the sample, he believed it to be a *bond fide* transaction, and that Mr. Struthers on the representation of the Banian, and Mr. Abbott on the representation of both, also believed it to be a *bond fide* transaction, and that all three went to the defendants' *cootee*, or place of business, under the belief that a contract had been entered into.

The evidence of Sree Gomanchurn Mookerjee, the Banian's Sircar, is in substance that he went to the screw-house, that the cotton of which the 79 bales were composed was given to him according to sample, and that the 300 bales were marked J. B. & Co., and the 79 bales J. B. & Co.
B. C. H. C.

How is the difference in the mode of marking the 300 bales and the 79 bales accounted for? Mr. Clarke said he would prove that there was no Hungul Ghaut cotton in the market at the time; and I am bound to say (though nothing of the kind is suggested in the letter of Messrs. Temple and Fenn) that upon the evidence it is left doubtful whether there was any such cotton in the market. But whether there was any or not, we find from the evidence of Mr. Thomas, of the firm of Robert Thomas and Co., who was called to speak to the price of cotton, that there was in the market cotton of equal quality and value; and it is clear that Hursook represented to the Banian that his principals had told him that the cotton of which the Banian had taken a sample was Hungul Ghaut cotton.

The Sircar drew somewhat upon his imagination when he stated that the defendants' jemadar refused to deliver more cotton, "as the prices had risen." I discredit this part of his evidence; for, while there can be no doubt the jemadar refused to deliver more cotton, it is in the last degree improbable that he should have "volunteered" a statement as to the reason of the refusal at variance with the interests of his masters.

The evidence of Premchand Mookerjee, the manager of the screw-house, and an independent witness, in whose testimony I place implicit reliance, agrees substantially with the evidence of Mohunlall, that no cotton could go out without the jemadar's consent; and this is very important with reference to Mr. Bell's contention that the 79 bales formed part of an independent contract. The books of the screw-house produced by Premchand show that 379 bales were screwed for J. Borrodaile and Co. How does this affect the question as to whether the 300 bales formed part of the cotton sold to Conjee Lilladhur? Mohunlall says: "I sold six boats of cotton—two at Cossipore at 18-8 per maund, and four at Sulkea at 18-5 per maund. The contents of the two boats were screwed into 289 bales, and of the four boats into 379 bales. The contract was made through Hursook in the name of Conjee Lilladhur." But to this is offered the evidence of Joynarain, the gomastah of Conjee Lilladhur, and the man with whom the contract was made. He says (and we have no reason to doubt his statement): "I bought two boats'-load of cotton from Mohunlall in July last through Hursook. It consisted of 358 unscrewed bales. I never got the goods. Hursook spoke to me about four other boats, but I did not buy them. I made a contract for only two boats. Hursook asked me to buy the other four boats. I refused. I never spoke to Mohunlall about the four boats. * * * I agreed to pay 17-12 for the two boats."

I believe the 300 bales formed no part of the contract with Joynarain's house. There is no evidence that he authorized the re-sale of the cotton; and the difference between 17-12, the price at which he purchased, and 18-5, the price subsequently given by the plaintiffs, has, instead of being paid to him, been pocketed without explanation by the defendants. Messrs. Temple and Fenn were not instructed to say, as it is reasonable to expect they would have been, if the defendants' was a true case, that the cotton in question was part of a lot which was originally sold to another house. On the contrary, their letter goes to show that the defendants treated the cotton as their own. Joynarain, though a witness for the defendants, does not assist the defendants' case. He says 50 bales were screwed, and he put his *Nagri* mark on them. Do any of the 379 bales bear a *Nagri* mark? If they do, why has no evidence been given of a fact so material, and yet so easy of proof? But if they do not, and in the absence of proof I must assume that they do not, the conclusion is inevitable, that the 50 bales formed no part of the 359 bales, and that the cotton sold to Joynarain's house was different from the 359 bales.

The cross-examination of Mohunlall shows that he had a great deal of other cotton at the time, and therefore that it was quite possible for him to have entered into separate and independent contracts with the different parties.

As to the sale of the cotton in the boats, Ramphul, the jemadar of the defendant, says: "I remember six boat-loads arriving in July, which were sold to Conjee Lilladhur and Hirjee Auruth through Hursook—four at Sulkea, and two at Cossipore. I was in the godown when the cotton from the four boats was screwed into 359 bales, and no more." Joynarain, on the other hand, says he only bought the cotton in two boats containing 358 unscrewed bales. And it is well known that unscrewed bales cannot by any possibility be increased in number, but the reverse, by the process of screwing.

The defendants have not explained why 300 bales were marked with the letters B C, indicating Banda cotton, and why 79 bales were marked with the letters H C, indicating Hungul Ghaut cotton; nor have they explained why, if 379 bales were all that were sold, a demand was made for more.

It is scarcely necessary to refer again to Deepchand's evidence, except, perhaps, upon one point. He denied having written part of a delivery order, and said he had neither authority to make contracts or give delivery orders; but after rejecting his evidence as to the tender, I should not be justified in adopting his evidence upon this part of the case; regard being had to the fact that he is

met by a contradiction as complete as in the former instance, I consider his evidence wholly untrustworthy.

Upon the whole, I am satisfied that the contract was entered into, and that the broker had authority to enter into it. I am also satisfied that the defendants were aware of the terms of the contract before they went to their Attorneys.

It cannot be said that the defendants have no interest in repudiating the contract; for Mr. Thomas has proved that the market was a rising market.

Having arrived at a clear conclusion on the merits, it remains to consider what would have been the position of the parties if the Statute of Frauds had not been set up? The action would have been one for the non-delivery of goods; and it would not have been necessary, if the plaintiffs were ready and willing to receive the goods, to prove tender. But as I am satisfied that both willingness to receive the goods and tender have been proved on the part of the plaintiffs, they would have been entitled to a verdict for damages; and the difference between the contract-price and the market-price on the day the contract was broken would have been the measure of damages. *Bowman vs. Nash*, 9 B. and C. 145.

The question whether the Statute of Frauds is applicable to a Hindoo defendant, the plaintiff being a Christian, arises under the third issue; and though it was one of the questions in the case of *P. Schneider vs. Kureem Ally*, heard before the present Chief Justice and Mr. Justice Jackson, it has never yet been the subject of a judicial decision. *Mr. Clarke*, at page 22 of his edition of the Rules and Orders, has raised the question in the form of a query; and, having carefully considered it as a question of much importance to all classes of the community, I have come to the clear conclusion that the Statute of Frauds does not apply.

The Supreme Court was constituted by Letters Patent dated 26th March 1774, and continued to be held under this Charter down to its abolition in July 1862. By various sections of the 21st Geo. III., c. 70, the powers of the Supreme Court are defined and limited. By sections 17, 18, 19, and 20, provision is made for suits in which natives may be interested; and the question raised by this issue depends upon the proper construction of section 17. The words of that section are: "Provided always, and be it enacted, that the Supreme Court of Judicature at Fort William in Bengal shall have power and authority to hear and determine, in such manner as is provided for that purpose in the said Charter or Letters Patent, all and all manner of actions and suits against all and singular the inhabitants of the City of Calcutta, provided that

their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentoos, by the laws and usages of Gentoos, and where only one of the parties shall be a Mahomedan or Gento, by the laws and usages of the defendant." This provision was subsequently extended to Madras and Bombay by the 37th Geo. III., cap. 142, section 13, with these additional words: "*or by such laws and usages as the same would have been determined by if the suit had been brought, and the action commenced in a Native Court:*" and these words are important as showing that it never could have been the intention of the Legislature to affect Gentoos or Mahomedans by the Statute of Frauds.

The law which obtained in the Supreme Court, and which now obtains in the High Court in its original jurisdiction, may be classed under seven distinct heads:

1. The Common Law as it prevailed in England in 1726, and which has not subsequently been altered by statutes specially extending to India.
2. The Statute Law which prevailed in England in 1726, and which has not subsequently been altered by statutes specially extending to India.
3. The Statute Law expressly extending to India, which has been enacted since 1726, and which has not been repealed.
4. The Civil Law as it obtains in the Ecclesiastical and Admiralty Courts in England.
5. Regulations made by the Governor-General in Council under the 13 Geo. III., c. 63, sections 36 and 37; 39 and 40 Geo. III., c. 79, section 18; and 53 Geo. III., c. 155, sections 98 and 99.
6. The Hindoo Law, in all civil actions in which a Hindoo is defendant.
7. The Mahomedan Law in all civil actions in which a Mahomedan is defendant

[See *Preface to Smoult and Ryan's Edition of the Rules and Orders*, p. 9.]

And if, as stated under the sixth head, the Hindoo law is to be applied in all civil actions in which a Hindoo is defendant, it is clear that the defendants in this case cannot rely upon the Statute of Frauds, as it forms no part of the Hindoo law. Mr. Justice Hyde, in his notes dated 1787, p. 204, commenting on section

17 of the 21st Geo. III., c. 70, says : " This provision was intended as a guide in doubtful cases on the principle that the " *defendants* ' " condition was to be favored by giving him the " *benefit of his own law* ; " and this, though not an authority, is valuable as showing the opinion of a learned Judge on a point arising out of a statute passed in his own time. The Statute 13 Geo. III., c. 63, was passed to regulate the affairs of the East India Company, and by section 30 British subjects are prohibited from taking more than 12 per cent. on loans. It was at first held that this statute did apply to natives (*Greedhur Baboo vs. Sree Luchundun Doss*, Mor. 350) ; but it was subsequently held that it did not apply to them (*Manickram Chottopadhia vs. Meer Conjeer Alli Khan*, Mor. 125) ; and this decision was afterwards recognized by the judgment of Peel, C.J., in *Holodhur Ghose vs. Connoylall Tagore*, 1 Ful. 411. *Manickram Chottopadhia vs. Meer Conjeer Alli Khan* also decides (and this is important) that the 13 Geo. III. c. 63, and 21 Geo. III., c. 70, *must have a parallel construction*. In *Jhan Khan vs. Henry Imlach*, Mor. 243 (cited by Mr. Bell), which was an action of ejectment by a native against a European British subject, it was held that the contract having been entered into by a British subject in Calcutta, he was entitled to the benefit of the English law ; but this does not necessarily apply in the present case. In *Doe dem. Savage vs. Bancharam Tagore*, Mor. 71, it was held that the Statute of Frauds applies to the wills of British subjects. I refer to this case as shewing that the Statute of Frauds was looked upon as applying to Europeans, and not to natives. These are the only authorities I have been able to find which bear directly or indirectly upon the question ; and taking the Charter and the 21st Geo. III., c. 70, section 17, together, and construing them according to the rules of law for the construction of statutes, I am clearly of opinion that this issue must also be found in favor of the plaintiffs, on the ground that the Statute of Frauds is not applicable to cases in which a Hindoo is defendant. It never can be allowed that a Hindoo is entitled to rely upon the Statute of Frauds when he is defendant, and to claim exemption from its operation when he is plaintiff. In this city, where there are, besides Christians and Hindoos, men of various classes—Greeks, Armenians, Jews, Parsees,—whose " *own* " laws it may be difficult to define, but who are willing to live under the English law, it would be unjust to let a Hindoo or Mahomedan claim, according as it might suit his interests, the benefit either of the Statute of Frauds or of his own law. Such a state of things would lead to endless confusion, as it would unsettle the very foundation of commercial dealing. It may now suit the defendants to get rid of their contract by claiming the benefit of the Statute of Frauds, but I could not hold that the statute applied to them without depriving both Hindoos

and Mahomedans, as a class, of the privilege to which they are undoubtedly entitled under section 17 of the 21st Geo. III., c. 70, *viz.*, that of having all cases of contract in which they are defendants decided according to their own laws. It is remarkable that from the time of the passing of the 21st Geo. III., c. 70, down to the present time, the Statute of Frauds has never been pleaded as a defence on behalf of a Hindoo or Mahomedan; and this is a strong circumstance—to show that the view I take of the law on this question is the correct one—as many cases must have occurred in which the defence might have been raised if applicable to Hindoos and Mahomedans. No hardship can possibly result from my decision in this case, as it is always open to parties to protect themselves in their commercial dealings by having the terms of any contract they enter into reduced into writing. Under section 186 of Act VIII. of 1859, the Court is required to state its finding on each separate issue, unless the finding upon one or more of the issues be sufficient for the decision of the suit. The finding on the third issue is sufficient for the decision of this suit; but as the learned Counsel on both sides are desirous that I should express my opinion on the remaining issues, I shall proceed to do so. I find the fourth issue in favor of the defendants, as it is admitted by both the broker and the banian that there was no written contract. The fifth and remaining issue is also one arising out of the Statute of Frauds. It is this: “Whether the plaintiffs have accepted any part of the cotton, or given something in earnest to bind the bargain or in part-payment.” As to the question of acceptance, I am of opinion that there has been no acceptance within the statute. By the statute (29 Car. 2, c. 3, s. 17) “No contract for the sale of any goods, wares, or merchandises for the price of £10 or upwards shall be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part-payment, or that some note or memorandum, in writing, of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.” A considerable difficulty has always been felt in determining what is a part-performance, a delivery, an acceptance, or a part-payment under the Statute of Frauds; and, as observed by Lord Campbell in a recent case, “it would be difficult to reconcile the cases on this subject.” The Courts in England have given full effect to the words of the statute, and discountenanced constructive deliveries and acceptances. Mr. Smith’s valuable Compendium of Mercantile Law contains an elaborate note on the 17th section of the Statute of Frauds. After reviewing the cases, he says: “It may be safely laid down that, on the one hand, there must be a delivery of the ‘possession,’ in order to sustain a count for goods sold and

delivered ; and, on the other hand, there must be an acceptance of the 'possession,' in order to satisfy the Statute of Frauds." And I think it is now clearly established that there can be no acceptance and receipt by the purchaser while the lien of the vendor remains, for the vendor's lien necessarily supposes that he retains the possession of the goods. In the present case the defendants *throughout* claimed a lien upon the 300 bales of cotton previously sold to the plaintiffs, and supposing they did, through their authorized broker, sell to the plaintiffs an additional 1,100 maunds, they must be taken to have claimed the same lien as in the former transaction. The non-delivery of the 300 bales shows that the defendants claimed a lien, and the tender of the purchase-money shows that the plaintiffs recognized their right to refuse delivery till tender. I will now examine the cases with the view of applying the law to the facts proved in this case. In *Tempest vs. Fitzgerald*, 3 B. and Ald. 680, Abbott, C.J., says: "The Statute of Frauds was made for wise and beneficial purposes, and ought to receive such a construction as will best accord with the plain and obvious meaning of the Legislature;" and in the same case Holroyd, J., says: "The object of the Statute of Frauds was to remove all doubts as to the completion of the bargain, and it therefore requires some clear and unequivocal acts to be done, in order to show that the thing has ceased to be *in fieri*." Those acts are either that the buyer shall accept part of the goods, and receive the same, or give something in earnest or part-payment, or that the contract be reduced to writing. *Maberly vs. Sheppard*, 10 Bing. 99, is one of a class of decisions which go the length of holding that as long as the vendor retains his right of lien over the whole of the commodity sold, there has been no such delivery and acceptance as the statute intended. See also *Smith vs. Surnam*, 9 B. and C. 561; *Bell vs. Bamert*, 9 M. and W. 37; Lord Campbell's judgment in *Morton vs. Tibbett*, 15 Q. B. 438; and *Farina vs. Home*, 16 M. and W. 122. The Court of Exchequer Chamber, in *Castle vs. Swarder*, 6 Hurl. and Nor. 828 (reversing the decision of the Court of Exchequer), held that there was evidence to go to the jury; that the character in which the plaintiffs held the goods was changed; and that if they held as warehousemen for the defendant, there was evidence of an acceptance and receipt of the goods by the defendant so as to satisfy the 17th section of the Statute of Frauds; but in the course of the argument, Byles, J., intimated that the plaintiff had no lien, because the goods were sold upon a credit of six months. Mr. Bell, in the course of his very able argument, cited *Nicholson vs. Bower*, 28 L. J. Q. B. 97; *Cusack vs. Robinson*, 330 L. J. Q. B. 260; *Harman vs. Anderson*, 2 Camp. 243; the note in Wells' and Bear's edd. of the Statute, vol. II., p. 157;

and *Dodsley vs. Varley*, 12 Adol. and El. 632; and contended that the vendor's lien was extinguished by the subsequent tender of the price for the whole of the 1,100 maunds, and that, after that act was performed, the defendants held tortuously against the plaintiffs. After a careful consideration of the authorities relied upon by the learned Counsel, I am of opinion that the legal effect of the tender was not to determine the defendants' lien. *Dodsley vs. Varley* is not an authority contravening the legal doctrine, that there can be no acceptance within the statute till the vendor's lien for the price is determined. That case cannot govern the decision in this, as the facts in the two cases differ in many points. In *Dodsley vs. Varley* the goods were earmarked, for the whole had been weighed and packed; and the only question was, whether there was a sufficient delivery and acceptance within the Statute of Frauds; but in this case the defendants have altogether repudiated the contract; and although the Court find that a portion of the goods were delivered to the plaintiffs for the purpose of being marked, yet, as the defendants' lien has not been extinguished, it cannot be held that there was such an acceptance and receipt as to satisfy the statute. In *Morton vs. Tibbett*, 15 Q. B. 434, Lord Campbell says: "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined." In *Dodsley vs. Varley*, Lord Denman says: "The plaintiff had not what is commonly called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant." Mr. Bell has failed to satisfy me that the defendants had no more than a special interest. It must, therefore, be taken that at the time the tender was made, the defendants had a lien. The fact of the tender having been made did not destroy such lien, so as to justify the plaintiffs in treating the defendants as holding the goods tortuously against them. Then as to the question whether something had been given in earnest to bind the bargain. To constitute a payment as earnest-money, or a part-payment within the statute, there must be an actual transfer or delivery of the thing or money. *Henderson vs. White*, 7 East. 858; *Walker vs. Nussey*, 16 M. and W. 302. The plaintiffs are not bound to show that something was given in earnest, if they can show a part-payment before action; and it is in evidence that Rs. 101 was paid to the broker at the time the bargain was made. It appears that after taking the money to his principal, he returned it to the banian, and then received it back and placed it

to the credit of the defendants in his books. But on the principle of the case in the Exchequer Chamber, it is clear that if the money was once paid to an agent with authority to receive it, what was done with it afterwards is immaterial. *Henderson vs. White* decides that the broker is the proper person to sign the memorandum in writing, and to receive the earnest-money ; and as the broker in this case had authority to receive the money, it is important that his acts as agent should be upheld. It is difficult to say why the banian should have received back the money ; but it is not improbable that he was satisfied with the assurance that the contract would be performed without it. The money, however, was afterwards returned. The broker finding that the market was rising, and apprehending the possibility of a repudiation on the part of the defendants, applied for the money to bind the bargain. As he had authority to receive it, the defendants are as much bound as if they themselves had received it. The decision on this point is of less importance to the parties than it would have been but for the decision on the main question on the Statute of Frauds. No evidence has been given of the market-price of the goods on the 24th of July, the day when they ought to have been delivered ; but Mr. Thomas has proved that the market-price of the Banda cotton, a description of cotton of about the same quality and value as Hungul Ghaut cotton, was Rs. 25-8 per maund on the 22nd of July ; and I find, as a fact, that the 1,100 maunds of cotton was sold at Rs. 19 8 per maund, and, assessing the damages on the principle of *Boorman vs. Nash*, 9 B. and C. 145, I allow, as the difference between the contract-price and the market-price on the 22nd of July, the sum of Rs. 7,801, including Rs. 101 given in part-payment ; the verdict to carry interest at 6 per cent. from this date, and costs.

Decreed accordingly.

IN THE MATTER OF THE ESTATE OF HENRY INGLIS.

FREDERICK GEORGE LESLIE *vs.* ISABELLA INGLIS.

The obtaining of Probate or Letters of Administration from the late Supreme Court is no ground for subjecting the party obtaining them to the Jurisdiction of the High Court in matters connected with the Estate in respect to which Probate or Letters of Administration were so obtained.

Mr. Justice Wells.—This is an application, under section 24 of Act VI. of 1854, for a summons requiring the defendant to show cause why an order for the administration of the estate of Henry Inglis, deceased, should not be granted. It has been held in *Lazarus vs. Hogg* that this Act, as far as respects administration summons, is an enactment in relation to Civil Procedure within the meaning of section 37 of the Letters Patent constituting the High Court, and is consequently still in force. The Supreme Court had jurisdiction over Executors and Administrators who had obtained probate or letters of administration from that Court in relation to all matters connected with the estates represented by them, and would have had jurisdiction in the present case, as the defendant, the widow and executrix of the deceased, proved his will in that Court, and obtained probate. But that no longer constitutes a ground of jurisdiction. Section 12 of the Letters Patent, which gives the High Court such original jurisdiction as it possesses, empowers the Court, in the exercise of its ordinary Original Civil Jurisdiction, “to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases, if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within the local limits of the ordinary Original Jurisdiction of the Court.” This is not a suit for land; and as the defendant is neither dwelling nor carrying on business, nor personally working for gain, within the local limits of the ordinary Original Jurisdiction of the Court, the Court has no jurisdiction, unless it can be shewn that the cause of action arose within such local limits. That is not disclosed in the affidavit, but the application may be renewed upon a further affidavit.

BURNBY vs. EYRE.

The Court is invested with discretionary Power to grant or to refuse applications made under section 175, Act VIII., for the examination by Commission of witnesses resident more than 100 miles distant from Calcutta.

Mr. Newmarch in this case moved for a Commission to examine, under sec. 175 of Act VIII. of 1859, as witnesses for the defendant, Major-General Campbell and Lieut. Col. Turner. An affidavit of Mr. Mirfield was put in, from which it appeared that both officers were resident at Benares, and therefore at a distance of more than 100 miles from Calcutta. A letter from General Campbell was annexed, and it was stated that great inconvenience to the public service would arise if he were compelled to come down to Calcutta, inasmuch as no satisfactory arrangement could be made for carrying on his military duties during such time as he should be absent; it was therefore requested that his evidence might be taken by Commission.

The letter which was read is as follows:—

Benares, 10th May 1863.

Messrs. SANDES, STACK and Co.

SIRS,

In reply to yours of the 7th instant, I have the honor to say it would prove detrimental to the public service were I to leave Benares, inasmuch as I have, at the greatest personal inconvenience, been refused temporary leave, because satisfactory arrangement could not be made for the command of my Division during my absence; therefore my evidence and that of Lieutenant-Colonel Turner had better be taken by Commission.

I have the honor to be,

• Sirs,

Your obedient servant,

GEO. CAMPBELL, Major-General,

Commanding Benares Division.

Mr. Bell, for Colonel Burney, said he would leave it to the Judge to say whether General Campbell had shewn that the public service required his attendance at Benares. If so, he would not insist on his attendance, although he thought the excuse unsatisfactory; but as to Colonel Turner, he submitted that no good reason whatever had been shown why he should not attend as a witness and be examined in Calcutta.

Mr. Justice Wells said: "It was not disputed that under the Act it was "not binding in him to grant a Commission merely because a witness was distant

" 100 miles, but that he had a discretion. The question was, whether a case had
" been made out. His Lordship thought that, taking the letter into considera-
" tion, a case had been made out as far as concerned General Campbell for
" having him examined under a Commission, but not so as to Colonel Turner.
" The evidence of General Campbell would be taken under interrogatories, with
" leave to add questions *viva voce*. As regards Colonel Turner, the application
" must be rejected. His evidence must be taken in Calcutta."

ORDINARY APPELLATE CIVIL JURISDICTION.

(Before the Hon'ble Mr. Justice Wells, Hon'ble Mr. Justice Morgan, and
Hon'ble Mr. Justice Levinge.)

S. M. SARODASOONDERY DOSSEE vs. TINCOWRY NUNDY.

The High Court has Jurisdiction to hear Appeals in Testamentary Causes.

In this case a question arose respecting the jurisdiction of the High Court to hear testamentary causes on appeal. The Court, having taken time to consider, delivered judgment as follows :—

Mr. Justice Levinge.—The jurisdiction of this Court to entertain the appeal before it having been now raised, it becomes necessary to decide the question before the argument in this appeal proceed further.

The jurisdiction of this Court depends upon the true construction to be given to the Charter which constitutes the High Court a Court of Judicature in Bengal. If the jurisdiction to hear this appeal is not conferred on this Court by that Charter, it does not exist; for the High Court is to have and exercise all such testamentary jurisdiction, and all such powers and authorities as may be granted and directed by the Letters Patent now under consideration.

For the purpose of my judgment it is not necessary to say more than that this is an ecclesiastical or testamentary suit which has been heard and determined in the regular way before the Lord Chief Justice and Mr. Justice Norman, who passed a decree in the suit, as a Court of first instance, on the 14th day of January in the present year. From that decree the present appeal has been brought.

The clauses of the Charter which give jurisdiction to the High Court to entertain testamentary and intestate matters are the 33rd and 34th. The 33rd clause repeals so much of the Letters Patent dated 26th March, in the 14th year of Geo. III. A.D. 1774, as empowers the Supreme Court to take cognizance of causes testamentary; and the 34th clause gives the same jurisdiction in that respect as was exercised by the Supreme Court. And here it must be remarked that there was no jurisdiction under the Letters Patent of 14 Geo. III. given to the Supreme Court to hear appeals in testamentary or intestate suits. The appeal was direct to the Privy Council, but that appeal was an "*appeal as of right.*"

We have now to see if there be anything in the present Charter which gives an Appellate Jurisdiction to the High Court in testamentary and intestate suits. Mr. Doyme, Counsel for the appellant, urges that the right of this Court to entertain this appeal is given by the 14th clause of the Charter, which gives an appeal to the High Court in all cases of Original Civil Jurisdiction from the judgment of one or more of the Judges of the High Court. He also relies, though not so strongly, on the wording of the 37th clause.

In my judgment, the High Court has no jurisdiction to entertain an appeal from the judgment of one or more of the Judges of the High Court, given in a cause or suit passed under its Testamentary and Intestate Jurisdiction. The right is not given by the 33rd or 34th clause—that is perfectly clear; and it is also a clear rule of law that no appeal lies, unless expressly given. Now, can this right be found in the 84th or 37th clause? I have before said the 14th clause gives an appeal to the High Court “*in all cases of Original Civil Jurisdiction*” when the decree has not been passed by a majority of the Judges of the High Court. But this suit does not fall within the words “*in all cases of Original Civil Jurisdiction*.” To my mind this is clear from the words of the Charter, as well as from its whole tenor and construction. Clause 12 deals with the Original Jurisdiction as to suits. The suits referred to in that clause have nothing to say to ecclesiastical suits or suits in the nature of ecclesiastical suits, but simply to suits of a “*Civil*” nature with respect to land, or to any other “*Civil*” suit between party and party—not to testamentary causes. Clause 13 deals with the Extraordinary Original “*Civil*” Jurisdiction, and gives power to the Court to remove, and to try and determine, as a Court of Extraordinary Original Jurisdiction, any suit being or falling within or without the Bengal Division of the Presidency of Fort William, when the Court shall think proper, but still having regard to its “*Civil*” jurisdiction. It is urged that this is a suit falling within that clause, but I am clearly of opinion it is not. The clause deals with the same class of suits as the 12th clause, *viz.*, of a “*Civil*,” not “*Ecclesiastical*,” nature. The heading of the 13th clause, which heading is part of the Charter itself, and is to be read in conjunction with the clause, as aiding and interpreting it, settles the construction, and interprets the clause as being confined to suits under the Extraordinary Original “*Civil*” Jurisdiction.

The 14th clause, so much relied on, is open to precisely the same objection. That clause deals with appeals from the Courts of Original Jurisdiction

to the High Court on its Appellate side, and is expressly confined to "*cases of Original Civil Jurisdiction.*"

It is to be remarked that the Charter, evidently in order to prevent confusion, and to simplify its comprehension, classifies and deals separately with Civil suits under its Ordinary or Extraordinary Jurisdiction; and with matters relating to its Criminal, Admiralty and Vice-Admiralty, Testamentary, and Intestate, and Matrimonial Jurisdiction. It deals with its "*Civil*" Jurisdiction in clauses 12 and 13, and follows by giving an appeal under that jurisdiction in clause 14; and then deals with its Criminal Jurisdiction in clause 21, and not with its Testamentary and Intestate Jurisdiction, until it reaches the 33rd and 34th clause. No clause on appeal follows, save the appeal to the "*Privy Council*" under clause 39. However, if I could find words in the 13th and 14th clauses that would warrant me in extending the provision of the appellate clause 14 to the 33rd and 34th clauses, I would willingly do so; for, in my judgment, words in a statute should be construed liberally so as to confer or aid a right of appeal; but I cannot find in those clauses, or in the construction of the whole Charter, any words that would warrant me in holding that an appeal lies to the High Court from a decree passed in a testamentary cause. The 14th clause failing to give the right contended for, it is urged that the 37th clause gives this Court jurisdiction, as it provides that "*Proceedings in Civil Suits of any description*" between party and party brought in the High Court shall be regulated by Act VIII., 1859; and inasmuch as section 332 of that Act provides that an appeal shall lie from the decrees of the Court of Original Jurisdiction to the Courts authorized to "*hear appeals*" from the decision of those Courts, this Court has therefore jurisdiction to hear this appeal.

I cannot subscribe to that construction. In the first instance, I must remark that section 332 of Act VIII., 1859, is repealed by Act XXIII. of 1861—see section 1 of that Act. The 23rd section of Act XXIII., 1861, is substituted, and if that section be carefully considered it will appear clear that it only deals with the powers and duties of Courts on hearing appeals where appeals are expressly given. It does not attempt to touch the right conferred by the Charter or any other Statute, but simply to provide to which Courts appeals are to go when the right to appeal exists. It is a section regulating procedure in appeals, not a section conferring a right of appeal. Besides this objection to the construction attempted to be put on clause 37 of the Charter, there is

another very patent one. Clause 37 merely purports to "*regulate proceedings.*" That is its heading. It has two headings, or interpretations, given to aid its construction, *viz.*, "*Civil Procedure,*" "*Regulation of Proceedings,*"—to say nothing of its position in the Charter. Now clause 37 only deals with the "*proceedings in Civil suits.*" This appeal is not a proceeding in a Civil suit within the meaning of the Charter: it is one in the nature of an Ecclesiastical suit under its Ecclesiastical Jurisdiction. (*Vide* heading to clause 33.) But as far as the construction of the 37th clause is concerned, if this cause testamentary was a "*Civil*" cause, no right of appeal would be given by it; for the clause merely deals with the procedure in appeals, such as those detailed in the 33rd and following sections of Act VIII., 1859, which regulate the form of appeals, notices, and the like. According to this construction, therefore, we have no jurisdiction to hear this appeal. In coming to this conclusion, it is not necessary for the purpose of this judgment to give my opinion as to whether the promovent has "*a right*" of appeal to the Privy Council under the Letters Patent of 14 Geo. III. as suggested by Mr. Newmarch, Counsel for the impugnant, who has submitted to us that the 33rd and 34th clauses of the present Charter are limited merely to the transfer of the jurisdiction in testamentary and intestate suits to the High Court, leaving untouched the right of appeal given by the 14 Geo. III. If this construction be not right, then, according to my view of the present Charter, the promovent has "*no right*" of appeal, and must apply to the Court which made the decree for liberty to appeal to the Privy Council under the 39th clause of the present Charter, which gives an appeal from any final judgment, decree, or order made either on appeal "*or otherwise,*" when the High Court shall declare that the case is a fit one for appeal to the Privy Council.

If no appeal as of "*right*," exists to the Privy Council under 14 Geo. III.—and upon that matter I carefully abstain from giving any opinion—I do not regret that the question of our jurisdiction was not raised at an earlier stage of the argument of this cause, for, speaking for myself alone, I have no hesitation in stating that, after hearing this case debated for some days, I consider that if I had heard it in the first instance, no matter which way I had decided—for or against the promovent—I would readily grant a certificate to the unsuccessful party so as to enable him to appeal to the Privy Council under the 37th section; more especially as by the construction I have been coerced into putting on the new Charter, I deprive the promovent of his "*right*" of appeal which he had under the old Charter. A right to one appeal at least is, in my judgment, a

right that a suitor should never be deprived of; and it certainly is the policy of those who regulate, from time to time, the jurisprudence of this country to give every facility of appeal.

Mr. Justice Morgan next delivered judgment as follows: I am extremely sorry that from the urgency of the matter I have not been enabled to give that mature deliberation to the subject which it so well deserves. I may state, however, that the opinion at which I have arrived is favourable to the jurisdiction of this Court to hear appeals in testamentary causes. While making this statement, I cannot refrain from remarking upon the great hardship which would result from an adverse decision on the part of the Court. The result would be the dismissal of the suit after four days' hearing, upon a plea which, if it were admissible at all, ought strictly to have been raised at the commencement of the case before any expense had been incurred.

Mr. Justice Wells.—This is an appeal from the judgment of the Chief Justice and Mr. Justice Norman in a testamentary suit which was originally instituted in the late Supreme Court, and was heard and determined in the High Court in its Testamentary and Intestate Jurisdiction. After the case had been partially heard, a doubt was suggested by one of my learned colleagues as to whether the Court had jurisdiction to entertain this appeal, and it therefore becomes necessary to determine the preliminary question before proceeding further with the case. The question, which is one of great importance and some difficulty, does not come upon me by surprise, as it was considered by me when the memorandum of appeal was presented, and I see no reason to alter the opinion which I then deliberately formed, and upon which I acted in admitting the memorandum of appeal. The question turns upon the construction to be put upon the sections of the Letters Patent constituting the Court, to which reference has been made.

Section 12 defines the "*Ordinary Original Civil Jurisdiction*" of the Court as to suits. The Ordinary Original Civil Jurisdiction under this section is distinct from the Testamentary and Intestate Jurisdiction.

Section 13 ordains that the Court shall have power to remove, and to try and determine, as a Court of Extraordinary Original Jurisdiction, any suit instituted in a subordinate Court subject to its superintendence. The section has no reference to suits instituted in the High Court in its Original Jurisdiction.

Section 14 ordains "that an appeal shall lie to the High Court from the judgment in '*all cases of Original Civil Jurisdiction*' of one or more Judges of the said High Court, or of any Division Court: Provided always that no such appeal shall lie to the High Court as aforesaid from any such decision made by a majority of the full number of Judges of the said High Court, but that the right of appeal in such case shall lie to us, our heirs or successors, in our or their Privy Council, *in manner hereinafter provided.*" The words "*in all cases of Original Civil Jurisdiction*" are wide enough to embrace matters testamentary and intestate, and the words "*in manner hereinafter provided*" refer to section 39, upon which I shall presently remark.

Section 15 gives the right of appeal from Courts in the Mofussil.

Section 18 provides with respect to the law or equity to be administered by the Court in the exercise of its "*Ordinary Original Civil Jurisdiction.*" The words "*Ordinary Original Civil Jurisdiction*" must be here understood in the same limited sense as in section 12, *vis.*, as not including matters testamentary and intestate.

Section 33 repeals so much of the Charter of the Supreme Court as relates to Ecclesiastical Jurisdiction.

Section 34 gives the Court the like power in relation to the granting of Probates and Letters of Administration as was exercised by the Supreme Court; but it gives no right of appeal in matters testamentary and intestate, so that no appeal can lie in such matters, unless they come within the scope of sections 14, 39, and 40.

Section 37 provides for the regulation of matters testamentary and intestate and matrimonial, and then provides "that, save as hereinbefore in this clause otherwise provided, the proceedings '*in Civil suits of every description*' between party and party brought in the said High Court shall be regulated by the Code of Civil Procedure prescribed by Act VIII. of 1859, and by such further or other enactments of the Governor-General in Council in relation to Civil procedure as are now in force." The words "*Civil suits*" as used here would clearly have included testamentary and intestate and matrimonial suits but for the saving clause by which they are expressly excepted.

Section 39 ordains that any person or persons may appeal to us, our heirs or successors, in our or their Privy Council, "*in any matter not being of Criminal Jurisdiction*" from any final judgment, decree, or order of the said High

Court of Judicature at Fort William in Bengal "*made on appeal*;" and from any such final judgment, decree, or order made in the exercise of Original Jurisdiction by a "*majority*" of the "*full*" number of Judges of the said High Court as "*hereinbefore mentioned*:" Provided in either case that the sum or matter at issue is above the amount or value of 10,000 rupees, or in case such judgment, decree, or order shall involve, directly or indirectly, any claim, demand, or question to, or respecting property amounting to, or of the value of 10,000 rupees; or from any other final judgment, decree, or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case is a fit one for the appeal to us, our heirs or successors, in our or their Privy Council, subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to ourselves in Council from the Courts of the said Presidency. The effect of this section is that a suitor cannot, "*as a matter of right*," appeal to the Privy Council from any final judgment, decree, or order of the High Court in its Original Jurisdiction without having first appealed to the High Court in its Appellate Jurisdiction, unless such judgment, decree, or order be made by a "*majority*" of the "*full*" number of Judges. The exception made in favour of judgments, decrees, or orders of a majority of the full number of Judges is practically useless, as the full number of Judges, that is, the whole fifteen Judges, never sit, and are never likely to sit, for the trial of original suits. The words, "*in any matter not being of Criminal Jurisdiction*" mean in "*all*" matters of Civil Jurisdiction as opposed to matters of Criminal Jurisdiction; and these words are certainly large enough to embrace, and were, in my opinion, intended to embrace, matters testamentary and intestate and matrimonial, as well as all other matters not being of Criminal Jurisdiction. The words "*on appeal*" and the words "*hereinbefore mentioned*" refer back to section 14, and establish a connection between that section and section 39, which renders it necessary that the two sections should be read together, and if read together, the words "*all cases of Original Civil Jurisdiction*" in section 14 must be taken to have the same extended signification as the words "*in any matter not being of Criminal Jurisdiction*" in section 39. If, therefore, matters testamentary and intestate are included in these words, then it follows that the right of appeal cannot be exercised under the Charter of the Supreme Court, as the Charter would in that case, as regards the provision relating to appeals, be inconsistent with the present Letters Patent, and would come within the operation of section 14 of the Letters Patent, which provides that so much of the Charter as is inconsistent with the Letters

Patent shall cease, determine, and be utterly void to all intents and purposes whatsoever.

Section 40 ordains that it shall be lawful for the High Court at its discretion, or if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or "*sentence*" of the said High Court, in any such proceeding as aforesaid, not being of Criminal Jurisdiction, to grant permission to such party to appeal against the same to us, our heirs and successors, in our or their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, orders, and "*sentences*." This section only applies to "*interlocutory*" judgments, decrees, orders, or sentences; but the word "*sentence*" points to the Testamentary and Intestate Jurisdiction of the Court, and would, if it had been used in section 39, have put the question of jurisdiction beyond all reasonable doubt. Its omission, however, cannot have been intentional, as it is impossible to conceive that the framers of the Letters Patent could have intended to place a suitor in a better position as regards an "*interlocutory*" sentence than as regards a "*definitive*" or "*final*" sentence. That there could have been no such intention is clear from the concluding words of the section: "subject to the same rules, regulations, and limitations as are herein expressed respecting appeals from final judgments, decrees, orders, and sentences." These words refer to section 39, and assume that the rules and regulations therein referred to apply to a final sentence as well as to a final judgment, decree, or order; and the only conclusion to be drawn from this is, either that the words "*final judgment, decree, or order*" in section 39 were thought to include a sentence which is in fact a decree, and is called in technical language a "*definitive sentence or final decree*;" or, which is more probable, that the word "*sentence*" was omitted unintentionally.

Section 41 provides that a person may appeal from any judgment, order, or sentence of the Court in the exercise of Original Criminal Jurisdiction, provided that the Court shall declare that the case is a fit one for appeal. A person who considers himself aggrieved is thus enabled to appeal to a high tribunal in both civil and criminal matters. The object of the framers of the Letters Patent was to make it as complete as possible, and they must, as regards the right of appeal, have treated the Testamentary and Intestate Jurisdiction as forming a branch of the Civil Jurisdiction; and hence it is that no "*separate*"

provision was made with reference thereto, such as has been made under this section in relation to the Criminal Jurisdiction.

Section 12 of Act XXIV. and XXV. Vic., cap. 104, which has been referred to, allows the Court, in its discretion, to continue the proceedings pending in the Supreme Court at the time of its abolition under and according to the practice of that Court. This refers to proceedings taken over from the Supreme Court to the High Court in its Original Jurisdiction, and has nothing to do with the present question.

Section 23 of Act XXIII. of 1861, which has also been referred to, was intended to apply to Courts of Original Jurisdiction as distinct from the Sudder Court, and cannot be made applicable to a branch of the High Court, which was substituted for, and was intended to occupy the place of the Sudder Court.

I regret that there should be any difference of opinion on so important a question. I am satisfied that this Court has jurisdiction to entertain this appeal, which will therefore proceed.

EXTRAORDINARY JURISDICTION.

Before the Hon. Sir Barnes Peacock, Chief Justice; the Hon. Sir Mordaunt Wells, the Hon. Mr. Norman, the Hon. Mr. Levinge, the Hon. Mr. Campbell, the Hon. Mr. Seton-Karr, the Hon. Mr. Raikes, the Hon. Mr. Steer, the Hon. Mr. Roberts, and the Hon. Mr. E. Jackson, Puisne Judges.

IN THE MATTER OF CHARLES PIFFARD, ESQ., B.A., AND EDMUND GEORGE FRANCIS, ESQ., CAPT. OF HER MAJESTY'S 20TH FOOT.

A Barrister, offended by the use of a strong expression on the part of a Judge while sitting in Court, sends an officer to the Judge's private residence upon a pacific errand to ask for an explanation. Held by nine Judges out of eleven, that the party sending the message and the party conveying it are guilty of contempt of Court.

The two gentlemen above named presented themselves this morning in obedience to orders contained in Rules issued by the Court.

The first Rule ordered "That Charles Piffard, Esq., do attend personally in the Court on Tuesday, the 26th day of May instant, at 11 o'clock in the forenoon, and that he then and there do show cause why, for his misbehaviour and contempt of this Court, his name should not be removed from the Roll of Advocates of this Court, or why he should not be suspended from practice as an Advocate of this Court, and from all the rights and privileges of such Advocate, for such time as the Court may think fit to order, or why he should not be otherwise punished according to law for his said misbehaviour and contempt."

The second Rule ordered "That Capt. S. E. Francis, of Her Majesty's 20th Regiment of Foot, do attend personally in this Court on Tuesday, the 26th day of May instant, at 11 o'clock in the forenoon, then and there to show cause why he should not stand committed to the custody of the Sheriff of Calcutta, or be otherwise punished according to law for a contempt of this Court."

Mr. Doyne, on behalf of Mr. Piffard, commenced his address by remarking upon the absence of any specific charge in the affidavit upon which the rules had been granted. He argued that Mr. Piffard was an English Barrister, and had the same privilege of speech here as at Home. That although the Charter gives the power to the High Court Judges to remove Barristers for reasonable cause, yet that reasonable cause would be the same as that for which the Benchers would disbar at Home, That the grounds upon which the Benchers would disbar at Home were

twofold—(1) such "*gross professional misconduct*" as would make a party unfit to be trusted with the interests of client, and (2) such "*moral turpitude*" as to render him unfit to be a member of an honorable profession. That the cases of Digby Seymour and Mr. Edwin James are the latest leading cases on this subject. Mr. Edwin James had misappropriated money, and received £1,000 from Mr. Ingram to refrain from a cross-examination. Mr. Digby Seymour, being largely indebted to a Solicitor, had sold his services to him. The first gentleman was disbarred, the second was not. He said that the Benchers would only interfere in matters affecting the professional and moral capacity of the Advocate. They took no cognizance of offences punishable by the law of the land.

The Chief Justice said that there was a case in 2 Atkinson's Reports where a Counsel was removed for assisting a ward in Chancery to marry.

Mr. Doyne replied that in that case the Counsel was suspended under the Statute of Westminster, and not from any power existing in the Judge.

The Chief Justice then put the case of a Barrister sending a challenge to a Judge, and asked whether or not the Judges would have power to remove him?

Mr. Doyne said that he was not prepared to answer that question. Cases must, he thought, be decided according to their individual merits. The Benchers had always proceeded on the ground of "*unprofessional conduct*" and "*moral turpitude*." The Judges had interfered only as Visitors of the Inns of Court. He would now pass on to the second point, and submitted that the Judges of the High Court have no power to inflict secondary punishment. Such a power, if it existed, might lead to the entire destruction of the independence of the Bar. The independence of the Bar was equally important with the independence of the Bench. It was the province of the Bar to weight the scales held by the Bench. If the Bench were empowered to exercise such a jurisdiction over the Bar, the latter would be intimidated and their independence lost. All men of honour would leave a Court where such a state of things existed, and nothing would be left but mean and mercenary trucklers to the Bench. He claimed the same independence for the Bar here as it enjoys in England. In this country it was most essential that one of the few protections against encroachment should not be assailed. It was clear that the Judges had not the power to suspend under the old Charter, and certainly they have none under the new. The word is "*remove*" in the present Charter, and that word cannot embrace the punishment of suspension; for the clause, being of a grave criminal character, must be construed literally. As regards the third point in the Rule, every Court has power to say what

is a contempt, and he was perfectly satisfied that the Court could not come to the conclusion that Mr. Piffard sent Captain Francis to Mr. Justice Morgan with any hostile intention. He would read the affidavits and other documents. The first was that of Mr. Justice Bayley :

I.

AFFIDAVIT OF MR. JUSTICE BAYLEY.

3 P.M. Saturday, May 8th, 1863.

In case I may be referred to in the matter of Mr. Piffard's address to the Bench to-day, I sit down as soon as possible after the cases in review have been gone through to note what happened, as far as the rapidity of the occurrences enables me to remember accurately.

On a review being called on about noon, in which Mr. Piffard was for the applicant, he stated that his points for review were : " That our Bench had not given its reason for not allowing costs and interest." I remarked that both were matters of discretion, and that I did not consider it imperative upon this Court to give any reasons, because costs and interest were matters in which the Court, reviewing the conduct of litigant parties as a whole, made its order without necessarily going into detailed reasons. At any rate, that its not doing so could not, *per se*, be an absolute ground for demanding a review, but that, in fact, reasons were given by us which I read. Mr. Justice Morgan asked Mr. Piffard to read his petition on the matter of costs, and the petition being read was in no way upon the point of " Our not giving reasons," but in so many words that " Our order was in itself unjust." Mr. Piffard proceeded to argue that this included his plea of " Our not giving reasons," and that in this case both costs and interest were essential points, the costs being due on previous litigation, and the interest being a just demand on money advanced. Mr. Piffard argued a little longer, when Mr. Justice Morgan asked if he had any other point, and Mr. Piffard said he had not. Respondent's pleader was then called, when I said I did not want to hear him, as I thought a review should not be granted, and Mr. Justice Morgan concurred. Mr. Piffard then stated that he had sat down because he understood the Court was with him, but that he had not finished, and wished to be heard further. He was again heard ; but going over the same ground again, Mr. Justice Morgan stopped him, and was expressing his view of the case, when Mr. Piffard interrupted him whilst speaking. Mr. Justice Morgan then said : " The Court is speaking, Sir ; will you be silent ? " Mr. Piffard, however, went on speaking. Mr. Justice Morgan then said : " Will you be silent, Sir ? " but certainly to my mind although warmly, still not offensively. Mr.

Piffard still made some observations which I did not catch. On this Mr. Justice Morgan said very sharply: "Hold your tongue, Sir." I then gave my opinion on the two points as a final judgment on my part which I meant it to be, and said it was. Mr. Piffard did not interrupt me then, but immediately afterwards again wished to speak, and I said that the case was concluded, that my judgment was given, and therefore I could hear no more. A few other cases were then proceeded with, and the next was one in which Mr. Piffard was engaged. He rose, and addressing me personally said, "he claimed the protection of the Court." On Mr. Morgan's asking what he said, Mr. Piffard remarked that he was addressing me, not Mr. Justice Morgan. Mr. Justice Morgan immediately interposed before I could speak (not that he did so with a view to interrupt me), and quite calmly suggested to Mr. Piffard that the question had better be referred elsewhere (which I suppose meant the Chief Justice) and Mr. Piffard's case be deferred. Mr. Piffard agreed to this, and stated that "if Mr. Justice Morgan would apologize for words spoken in heat." Immediately before the sentence was finished, Mr. Justice Morgan left the Bench, and Mr. Piffard then left the Court, and other cases were called on. Mr. Justice Morgan then returned to the Bench, and the other cases were heard. Mr. Piffard may have said, "apologize for the insult," but I cannot clearly remember whether I heard those words or not.

II.

THE LETTER OF MR. JUSTICE MORGAN TO THE CHIEF JUSTICE.

Monday, May 10th.

MY DEAR CHIEF JUSTICE,—Last Saturday Mr. Piffard applied to Mr. Justice Bayley and myself for a review of judgment in a case decided by us. I had occasion very frequently to interrupt the learned gentleman in his address. I did so, because I considered his remarks sometimes irrelevant, sometimes a repetition of what he had already urged. When he had concluded, and while I was stating what occurred to me as proper to be stated in disposing of the application, Mr. Piffard rose and began to speak. I asked him not to interrupt me, and proceeded with my judgment. But the gentleman continued to speak, and I therefore again requested him not to interrupt me. He still persisted, upon which I shouted out, "Hold your tongue, Sir," or some such words, after which he was silent. A case was called on not long afterwards in which Mr. Piffard was the applicant's Counsel. He commenced his speech by referring to what had occurred in the previous case. According to my recollection (which I believe in this differs from Mr. Justice Bailey's), he spoke of the way in which he had been insulted by me, and proceeded to suggest that I should apologize

to him. I said that I could not listen to such observations, and rose to leave the Court. Ultimately the case was postponed, and nothing further occurred in Court. That evening, about 9 o'clock, the card of Captain Francis was brought to me at my house, and I saw that gentleman, who informed me that he had come from Mr. Piffard. He alluded to the morning's occurrence, and asked me, on Mr. Piffard's behalf, for an apology. I cannot undertake to repeat what was said word for word. When I had heard enough to acquaint me generally with the nature of his errand, I told him that I must absolutely decline to enter upon any discussion with him concerning the matter. The conversation may have lasted five minutes. I believe I have stated the effect of it. I wish to bring to your knowledge and to the knowledge of the other Judges the conduct of Mr. Piffard (who is an Advocate of the Court) both in Court and afterwards. My relation of the facts may be incomplete, but I think the matter is of sufficient importance to justify my bringing it before you.

I am,

My dear Chief Justice,

Yours very faithfully,

(Signed) W. MORGAN.

III.

LETTER OF THE CHIEF JUSTICE TO MR. PIFFARD.

To CHARLES PIFFARD, ESQ.

High Court, May 12th, 1863.

SIR,—I am directed by the Chief Justice to forward to you a copy of a letter which has been addressed to him officially by one of the Judges of the Court, Mr. Justice Morgan.

The Chief Justice regrets that anything should have occurred to interrupt that good feeling which has hitherto existed between the Bench and the Bar.

He intends to call a meeting of the Judges to take the matter into consideration, and to lay before them the letter which he has received from Mr. Justice Morgan, in order that they may determine what steps ought to be adopted. Previous to doing so, however, his Lordship desires to know whether you wish to offer any explanation, and especially as regards that part of the letter which refers to your having sent Capt. Francis for an apology.

I have the honor to be,

Sir,

Your obedient servant,

(Signed) E. B. PEACOCK,

Clerk to the Hon'ble the Chief Justice.

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IV.

LETTER OF MR. PIFFARD TO THE CHIEF JUSTICE.

To E. B. PEACOCK, *Esq.*,

Clerk to the Chief Justice.

High Court, May 13th, 1863.

SIR,—In answer to your letter of yesterday's date, enclosing a letter from Mr. Justice Morgan to the Chief Justice, I have the honour to request that you will submit to the Chief Justice the accompanying copy of the account drawn up by those who witnessed what passed between Mr. Justice Morgan and myself on the 9th instant.

With regard to "that part of Mr. Justice Morgan's letter which refers to my having sent Captain Francis for an apology," I have the honor to request that you will submit to the Chief Justice the accompanying account by Captain Francis of what passed between himself and Mr. Justice Morgan on that occasion.

I have to express my sincere regret that the course I adopted was one which might possibly be misinterpreted as a hostile message, but I beg to assure the Chief Justice that such was not my intention, nor was such the character of Captain Francis's mission.

We are both of us perfectly aware that a Judge cannot accept a challenge to a hostile meeting, and therefore that to invite him to one would be as absurd as it would be unworthy and indecorous.

I was anxious, before submitting the case to the Bar, to assure myself that I had done everything in my power to allow Mr. Justice Morgan an opportunity of retracting or explaining his language, which I considered insulting to me as a Barrister.

I feared that if I called on him for this purpose myself, I might, in discussing what had taken place, forget the respect due to Mr. Justice Morgan's office.

I therefore asked Captain Francis, my oldest and most intimate friend, and a man in whose judgment and perfect temper and courtesy I have and had the most complete reliance, to call on Mr. Justice Morgan, and see whether by his intervention it was possible to avert the disagreeable alternative of my asking the profession to express their opinion on the conduct and language of Mr. Justice Morgan.

My express instructions to Captain Francis were to let Mr. Justice Morgan understand that he did not come with any hostile intention, but merely

to ask for such an explanation, or apology, or withdrawal, as Mr. Justice Morgan might, on consideration, feel that he ought to make.

I submit that in so doing neither Captain Francis nor I infringed on the impunity of a Judge's station, and that there was no more impropriety in the act than in seeking an explanation from a clergyman or a woman.

Finding that Mr. Justice Morgan refused even to listen to Captain Francis sufficiently to ascertain the real character of his mission, I had no alternative but to submit to the profession, as I had done before receiving your letter, Mr. Justice Morgan's language and conduct on the Bench, and to leave to the Calcutta Bar the vindication of our privileges.

I have the honour to be,

Sir,

Your obedient servant,

(Sd.) CHARLES PIFFARD.

V.

AFFIDAVIT OF MR. PIFFARD.

"I, Charles Piffard, of No. 2 Loudon Street, Calcutta, Barrister-at-law, and one of the Advocates of the High Court of Judicature at Fort William, make oath and say:—

"1. That I have read the affidavits made herein by Mr. Justice Bayley and Mr. Justice Morgan, two of the Puisne Justices of this Honorable Court, and that to the best of my memory and belief the facts stated by Mr. Justice Bayley are correct down to the words "wished to be heard further. He was again heard."

"2. I say that on being permitted to address the Court I proceeded to argue on the points which, at Mr Justice Morgan's request, I had previously simply stated without argument.

"3. I say that in the course of such argument I was frequently and, as it appeared to me, unnecessarily, but not offensively, interrupted by Mr. Justice Morgan, but was not stopped by him, and that after I had urged all that I thought proper, I of my own accord sat down.

"4. I say that thereupon Mr. Justice Morgan rejected my application, and gave his reasons for doing so, and after finally disposing of the case, Mr. Justice Morgan proceeded to make some general observations on the necessity of making stringent rules to prevent the time of the Court being taken up in hearing

matters urged in review which could not properly be urged, and, as it appeared to me, intimated his opinion that in the case just concluded the time of the Court had been taken up by me with argument on points which Counsel ought to have known were not arguable on review.

" 5. I say that I thereupon in what I intended to be, and do verily believe was, a courteous and respectful manner, rose for the purpose of explanation ; stating that what his Lordship complained of was caused by the want of uniformity in the rulings of the different Benches as to what were and what were not proper grounds for review ; and that in fact in the case of *Thakoor Coomar vs. Payer Tewarree and another* a review had been granted to me by another Bench on grounds precisely similar to those which the Court had just refused to listen to, when urged by Mr. Cochrane in the case immediately preceding my own.

" 6. I say that I am unable to state precisely how far I got in making such explanation. Mr. Justice Morgan shook his head, and waved his hand at me which I understood as a token of impatience ; but I did not hear any articulate words until Mr. Justice Morgan said, " Will you be silent, Sir?" and immediately afterwards, " Hold your tongue, Sir, be seated," in a loud, violent, and offensive tone. I expressed my surprise at hearing such language from the Bench, and then sat down, and Mr. Justice Bayley delivered judgment, also rejecting my application for review.

" 7. I say that the remainder of the account given by Mr. Justice Bayley differs in no material point from what I remember to have occurred.

" 8. I say that on the same afternoon I addressed letters to the Secretary of the Bar Library of the late Supreme Court, and the Secretary of the Pleaders' Library of the late Sudder Court, shortly stating what had occurred.

" 9. I say that after those letters were written it occurred to me that the Bar, before taking into consideration Mr. Justice Morgan's conduct towards me, might wish to be satisfied that I had done all in my power to settle the matter amicably and privately with Mr. Justice Morgan before bringing the Bar into collision with a Judge on a matter which I would have been perfectly ready to forget, had the learned Judge offered the slightest expression of regret at having, in the heat of the moment, made use of a hasty and uncourteous expression.

" 10. I say that at about half-past six on the same evening I, acting on the impression which I have mentioned in the last paragraph, called on Mr. Eden,

and asked him to call, as a friend, on Mr. Justice Morgan, and recall to him the occurrences of the morning, and express my hope that he would not refuse to recall, or state that he regretted, the words he had used, and the manner in which he had used them.

"11. I say that what passed between Mr. Eden and myself is substantially and truly set out in the written statement drawn up by me and signed by Mr. Eden, and in the accompanying letter written to me by Mr. Eden. I also say that the accompanying written statement, being a letter addressed by me to Mr. E. B. Peacock, Clerk to the Chief Justice, is, to the best of my memory and belief, a true and correct statement.

"12. I say further that had Captain Francis, on his return from Mr. Justice Morgan's, told me that the latter gentleman had tendered the slightest apology, or expressed the least regret, I would at once have recalled my letters to the Secretaries of the two Bar Libraries, and that no meetings would have been held at my instance.

"I distinctly swear and say that I had not any intention whatever, when I requested Captain Francis to call on Mr. Justice Morgan, of sending a hostile message, or provoking a hostile meeting, or of appearing to do so, and that my sole motive was, as I have stated before, the hope that Mr. Justice Morgan might, after he had had time for reflection, think proper to offer such expressions of regret as would have fully satisfied me, and, as it appeared to me, he might as a gentleman to a gentleman, without any derogation to his dignity or independence as a Judge, have offered for words spoken in a moment of heat; but which it was impossible, as it appeared to me, that I, either as a gentleman or a member of an honourable and privileged profession, could submit to without protest or remonstrance."

VI.

AFFIDAVIT OF THE HON'BLE ASHLEY EDEN.

"I, Ashley Eden, of Middleton Row, in the Town of Calcutta, make oath and say as follows:—

"First. That on the sixteenth day of May instant, whilst the occurrences referred to in the annexed paper, marked A, were fresh in my memory, Mr. Piffard submitted the said annexed statement to me, and I then wrote him a letter in reference thereto, which is annexed and marked B; and I say that the said statement A and the said letter B are, together, substantially correct

statements of what passed between Mr. Piffard and myself, and of the impressions left on my mind on the occasion to which they refer."

EXHIBIT A.

'At about six or half-past six on Saturday evening I called on Mr. A. Eden at his private residence in Middleton Street, and told him that Mr. Justice Morgan had that morning addressed me in Court in a tone and manner and in language by which I had felt very much affronted, and asked him to oblige me by calling on him, stating the facts, and ascertaining whether he was willing to express his regret for what had occurred.

'Mr. Eden immediately declined to accede to my request, and added (I cannot remember the very words, but something equivalent to a warning), not to do anything so rash as to send a hostile message to a Judge.

'I thereupon explained to Mr. Eden that I was quite aware that no one could send or carry what is called a hostile message to a Judge; that the only satisfaction that could be asked from a Judge was an apology or an explanation, and that; if both of these were refused, the only alternative was to appeal either to the profession, or to the public, or the Bench (I do not remember which expression I used), and that what I wanted Mr. Eden to do was to act as such a mediator, and that I could hardly anticipate any other result of his calling on Mr. Morgan than that Mr. Morgan would at once proffer the desired amends.

'Mr. Eden still doubted whether his intervention would be of any service to me, and for other reasons, which were to me conclusive, declined personally to intervene in any way whatever in the matter.

'I then told Mr. Eden that I should have to avail myself of the services of another friend; and on his again warning me to be very circumspect, I said I should give my friend such instructions as would preclude Mr. Justice Morgan or any one from representing his visit as one for the purpose of carrying a hostile message.

C. PIFFARD.'

"I have read the above, and consider that it is a substantially correct statement of what passed.

A. EDEN."

EXHIBIT B.

May 16th.

MY DEAR PIFFARD,—I have read the paper you sent me, and return it. It substantially and correctly describes what passed between us on the evening of Saturday.

When first you told me that you proposed to send and ask Mr. Morgan to express regret for the manner in which he had addressed you, I for a moment thought that you intended to demand an apology; but upon my asking you if that was your intention, you most positively disclaimed any desire to send a hostile message, but you appeared to think that Mr. Morgan would not hesitate to express regret for any pain which he had caused you, as a member of society, for the manner in which he addressed you from the Bench. I did not concur in this view; for it seemed clear to me that Mr. Morgan would naturally treat the matter as an official matter entirely, and such an expression of regret from him, as a private individual, would have been, to all intents and purposes, an admission that he had taken advantage of his position as a Judge to make use of stronger language than he had any right to use; in fact, I anticipated that he would act precisely as he has acted, and his only chance of justifying his own conduct was to put you in the wrong. Hence my caution to you.

Let me have a copy of the memo., which is returned hereafter. Wishing you well out of an awkward business,

Yours truly,

A. EDEN.

VII.

AFFIDAVIT OF MESSRS. GREGORY, SHEPPARD LESLIE, AND OTHERS.

"The review case was called on before the Court, consisting of Mr. Justice Bayley and Mr. Justice Morgan. Mr. Piffard, Counsel for appellant, opened the point, speaking for about ten minutes. Mr. Justice Morgan enquired who was on the other side, on which Mr. Piffard sat down, and Baboo Rumesh Chunder Mitter, who was on the other side, then rose. Mr. Justice Morgan thereupon said: "The petition is rejected," on which Mr. Piffard got up and observed that he had sat down under the impression that the other side had been called upon to answer, but as he had been mistaken, he would proceed to argue, which he did for a few minutes. On his stopping, Mr. Justice Morgan delivered judgment, and rejected the review. He then proceeded to remark upon the length of the speeches of Counsel and Pleaders in review cases, and the necessity of some stringent rules being made on the subject, on which Mr. Piffard rose and began some observations which he did not finish, for Mr. Justice Morgan in a loud and insulting tone of voice said, "Hold your tongue, Sir." Mr. Piffard expressed his surprise at such language, and Mr. Justice Morgan in the same insulting tone and manner said, "Sit down, Sir." Mr.

Piffard then sat down. Neither in his argument nor when he attempted to address the Court did he employ any expression or adopt any tone unbecoming his position as an Advocate or a gentleman; and from neither could the Court take the slightest offence.

Another case of Mr. Piffard's, which followed in succession to cases of other pleaders, was then called on. Mr. Piffard, addressing Mr. Justice Bayley as senior Judge, asked whether he (Mr. Piffard) was to be protected from such insults as had been inflicted on him in the previous case, and said that if Mr. Justice Morgan would merely say that the expression complained of had been used in a hasty moment, nothing more would be said about the matter. Mr. Justice Morgan made no reply, but left the Bench; but shortly after returned, and then stated that Mr. Piffard's case had better be postponed till another day, as the matter must be settled elsewhere.

We, the undersigned, were present, and declare the above statement of facts to be correct.

(Signed) C. GREGORY,

(„) MUTTYLAUL MOOKERJEE.

“ („) SHEPPARD LESLIE.”

We, the undersigned, were present during the occurrence mentioned in the above document, which contains a substantially correct statement.

(Signed) CHUNDER MADHUB GHOSE.

(„) RUMESHCHUNDER MITTER.”

VIII.

AFFIDAVIT OF CAPTAIN GEORGE EDMUND FRANCIS.

“I, George Edmund Francis, of Chowringhee Road, in the Town of Calcutta, Captain in Her Majesty's 20th Foot, make oath and say as follows:—

“First.—I say that although I do not quite understand how I am accused of contempt of Court, still that I believe that the rule, in support of which Mr. Justice Morgan's affidavit has been sworn, has been granted under an impression that I was the bearer of a hostile message to Mr. Justice Morgan on behalf of Mr. Piffard.

“Second.—On the 9th day of May instant, Mr. Charles Piffard asked me to go to Mr. Justice Morgan to endeavour to obtain from him an expression of regret for the disagreeable language used by Mr. Justice Morgan to Mr. Piffard in the morning of that day.

Third.—Before going to Mr. Justice Morgan, Mr. Piffard warned me that Mr. Justice Morgan's position as a Judge gave him immunity, and that it would be out of all order that the message to be conveyed should be treated as of a hostile character. I could readily understand this; my own conviction, besides, was that the whole affair was one so unimportant that even to have made it matter of a duel with a private individual, supposing such private individual had used the language complained of, would have been perfectly preposterous. With Mr. Piffard's warning in my ears and my own conviction, I called on Mr. Justice Morgan, and, in a perfectly conciliatory manner, mentioned that I had come from Mr. Piffard. Upon hearing Mr. Piffard's name, Mr. Justice Morgan declined to hear me further, begging me to say no more; and when I tried to continue the conversation, he said: "Without meaning discourtesy to you, I decline discussing the matter," and then left me; and I say that in my letter to Mr. Piffard of date the 13th May instant, which is hereto annexed and marked, I have correctly described the substance of my interview with Mr. Justice Morgan.

Fourth.—My errand was entirely and purely of a peaceful character, and the only reason that Mr. Morgan did not become entirely acquainted with my object was entirely owing to his refusing to listen to me; and if he had listened, he could not have gained any idea that I was the bearer of a hostile message; and I swear that if Mr. Piffard had asked me to be the bearer of a hostile message to Mr. Justice Morgan, I would at once have refused to do so.

Fifth.—To the best of my recollection I did not in my interview with Mr. Justice Morgan use the word "apology."

Sixth.—I further say that if my opinion as to the Court imagining that I was the bearer of a hostile message is incorrect, I am wholly at a loss to understand in what way I have committed any contempt of Court; for I say that I tried and verily believe that I was in every respect courteous to Mr. Justice Morgan both in tone, language, and manner, and that I left Mr. Justice Morgan's house under the impression, which I still entertain, that the courtesy which I had shown to him was not shown by him to me, and that I had been treated by him in a way which my conduct did not call for.

Mr. Doyne, having read through all the affidavits, continued his address. He called attention to the fact that Mr. Justice Morgan in his affidavit stated that he *thought* the word "apology" was used by Captain Francis, but Captain Francis did not mention the word. Possibly the idea that the message

was hostile came into the Judge's mind from the time of night at which the visit was made, and from the surrounding circumstances. The learned Counsel submitted to their Lordships that Mr. Piffard, in sending a gentleman to ask an explanation of Mr. Morgan, was only doing that which every gentleman had a right to do. The act, it was true, was capable of misconstruction, and it was by reason of Mr. Morgan properly refusing to hear the message brought by Captain Francis that all the present misunderstanding arose. The case of *Rex vs. Vaughan* in Douglas' Reports 511 shewed that the Court would be satisfied when a party denied all intention to commit a contempt. The entire case was that Captain Francis went at nine o'clock at night, that after a five minutes' conversation Mr. Justice Morgan cut short the interview, and Captain Francis left the house. He hoped the Court would not hold that there was any contempt. Mr. Piffard had the most abundant reason to require an explanation. He adopted a course which, though open to misapprehension, shewed no intention of acting in contempt of Court. Both Captain Francis and Mr. Piffard had denied in their affidavits that they had any intention of acting in contempt of Court, and therefore there was no contempt. Any man had a right to ask an explanation of another, however exalted that other's position might be; and it could not be said that the sending Captain Francis was an attempt to intimidate the Judges in the discharge of their judicial functions. He therefore called upon the Court to dismiss the rule; for he felt sure that their Lordships would come to the conclusion that Mr. Piffard, though suffering under great irritation, had nevertheless acted without hostile intention toward Mr. Morgan.

The Court here adjourned and returned again in half an hour. *Mr. Bell* then opened his address on behalf of his client Captain Francis.

Mr. Bell said that he appeared before their Lordships on behalf of Captain Francis, against whom a rule had also been issued, calling upon him to show cause why he should not be punished by fine or imprisonment for contempt of Court. He would proceed by steps up to the time at which Captain Francis came upon the stage. The rule had been issued upon the affidavits of Mr. Justice Bayley and Mr. Justice Morgan. What Mr. Justice Bayley's affidavit had to do with Captain Francis he did not see; but of this he was certain, that there was no case in which contempt of Court had been fixed upon any one upon any such grounds as these. The great modern cases of contempt were the cases of *in re Van Sandau*, *I. Phillips*; *in re Dyce Sombre*, 1 M. & G., and

Letchmere Charlton, 2 M. & G. The great principle was—"Was the communication such as would influence the Judge by intimidation or otherwise in his decision in a Court of Justice?" If it had not been such, there was no contempt, and then the proper course was by filing a criminal information. The latest case on the subject of contempt was that of the Sheriff of Surrey, Mr. Evelyn, but the contempt there was, as it were, in the face of the Court. There was no case in either the English or Irish Reports similar to the present one. If instead of the Court taking action direct, any learned friend of his had moved in the present case for such a rule as this, the Court would have called upon him for a precedent before granting it. No case could be found carrying the doctrine of contempt further than it was held in *Dyce Sombre's Case*.

The Chief Justice asked whether the learned Counsel meant to say that if, after a Judge had given his decision, contemptuous language were used to him in consequence of that decision, there was no contempt?

Mr. Bell replied that if in Court it would be a high contempt. In the case of *Dyce Sombre* the Lord Chancellor said: "Every private representation to a Judge for the purpose of influencing his decision in the matter publicly before him is and always ought to be treated as a high contempt of Court."

Mr. Justice Wells drew the attention of the learned Counsel to a very strong case in *Salkeld's Reports*, p. 48, where a party upon whom a process was being served spoke contemptuous words of the Judge who issued it. This was considered a contempt of Court.

Mr. Bell continued.—In *Hawkins' Pleas of the Crown* he found the heads of contempt by a stranger drawn up in detail, and under none of these heads did the present case fall. If Mr. Justice Morgan were of opinion that a hostile message had been sent, why did he not mention it in his affidavit? There was not a single word to be found respecting such a thing, and therefore the whole idea of whether or not a hostile message be punishable might be discharged from the mind of the Court. Was it to be said that because Captain Francis went for the purpose of arranging matters, and to prevent the public scandal which now attaches, was it to be said that on that account Captain Francis was to be considered guilty of contempt of Court?

Mr. Justice Wells said that as a matter of justice to Captain Francis, inasmuch as Mr. Justice Morgan would not hear him when he called, the Court ought to give full effect to what he now had the first opportunity of explaining as to what took place.

Mr. Bell said he thought that their Lordships' view was the correct one. If *Mr. Justice Morgan* had listened to *Captain Francis*, this would never have occurred. Suppose *Captain Francis* had written to *Mr. Morgan* as follows: "Sir,—I have been asked by *Mr. Piffard* to communicate with you about the unfortunate matter that occurred this morning," and *Mr. Morgan* had stopped at that point, the Court could not possibly say that such letter was a contempt. Where then was the contempt in the state of things which actually took place? What could be more natural than for a gentleman like *Captain Francis* to go on such an errand? *Mr. Piffard* could not procure the services of *Mr. Eden*, he could not avail himself of the services of any member of the Bar, and to whom could he apply with greater propriety than to a gentleman of tact like *Captain Francis*? Was it not the most natural thing in the world to send a man who was a mutual friend upon a pacific errand; and if it were so, was it not also natural to send a friend of one of the parties, if a mutual friend were not obtainable? If their Lordships should think otherwise, such a determination would simply lead to the decision that under no circumstances is any one to be the bearer of a pacific message to a Judge respecting matters occurring in Court, without rendering himself liable to all the penalties attaching to heavy contempt of Court. He trusted that their Lordships would not only discharge the rule as against *Captain Francis*, but also record their opinion that in acting as he had done, he had acted in a praiseworthy manner, and was altogether free from blame.

At the conclusion of the learned Council's address, their Lordships retired, and returned after an absence of two hours and-a-half, when the Chief Justice delivered judgment:—

His Lordship expressed deep regret that anything should have occurred to interrupt the harmony existing between the Bench and the Bar. He had no hesitation in stating that, in his opinion, both *Captain Francis* and *Mr. Piffard* had been guilty of contempt of Court. Eight of the Judges agreed with him, but *Mr. Justice Wells* and *Mr. Justice Raikes* were of opinion that *Captain Francis* had not been guilty of contempt of Court, or of any other offence, but that *Mr. Piffard*, although not guilty of contempt of Court, had been guilty of misbehaviour as an Advocate. Although the majority of the Judges were of opinion that both these gentlemen had acted in contempt of Court, they did not wish to visit the offence with any punishment. The Court would be content with an apology, nor need the apology be an abject one, but simply such as

would convey the expression of their sorrow at having committed that which the Court considered to be contempt.

Mr. Doyme, on behalf of his client, expressed regret that *Mr. Piffard* should have committed any act which could be considered contempt of Court.

Mr. Bell said that Captain Francis, in consequence of the decision arrived at, being the decision of the majority, felt himself compelled to bow to it; but at the same time he begged to state that he, Captain Francis, had never intended his conduct to be such as could be construed to be improper either in regard to *Mr. Morgan* or any other man.

His Lordship said that the Court was satisfied with the expression of regret which these gentlemen had made. Nothing which had occurred could or ought to affect *Mr. Piffard* in the minds of the Judges hereafter. In the opinion of his Lordship, when gentlemen inadvertently committed an act in contempt of Court, they did honour to themselves in apologizing. As to Captain Francis, the Court could not think that anything which had been done by him detracted from his character as an officer, a man of honour, and a gentleman. He might have acted hastily; but after what he had said on hearing the decision at which the Court had arrived, there was nothing whatsoever that could affect his future prospects, or prejudice him in any way, either in the mind of the Judges or in the estimation of the world at large.

Both Rules discharged.

NOTE.—The power of Colonial Courts to prevent Advocates who misconduct themselves from practising before them cannot be disputed. See *In re the Justices of the Court of Common Pleas at Antigua*, 1 Knapp 267, where *Lord Wynford* says: "Now Advocates and Attornies have always been admitted in the Colonial Courts by the Judges, and the Judges only. The power of suspending from parctice must, we think, be incidental to that of admitting to practise, as is the case in England with regard to Attornies." As to punishment for contempt out of Court, see *Dean's case*, Cr. Eliz. 689, where *Anderson, J.*, says: "There are divers statutes that for private discourtesies one shall not be imprisoned; and therefore I do not see how this custom can be maintained. A man may be imprisoned for a contempt done in Court, but not for a contempt done out of Court; and therefore he ought not to have been committed for such a private abuse." By assent of the whole Court the prisoner was discharged. See also *Rex v. Faulkner*, 2 Mon and Ayr 321, where *Lord Abinger* says: "Then, if the Judge had received that letter not sitting in Court, it would not have amounted to a contempt;" and again: "I can only say that if I received such a letter, I should not consider myself at liberty to commit him." *Alderson, B.*—"There would be a great many committals if such a course were pursued by Judges." *Lord Abinger.*—"Do you mean to say that one of the Judges has the power to fine a man for sending him a silly letter or an impudent letter about any matter that he has decided? I can only say that I should be very much afraid of exercising it."

HENRY MATTHEW MIRANDA *vs.* THOMAS HAN.

Construction of a Will.

Mr. Newmarch for the plaintiff.

Advocate-General for the defendant.

In this suit the plaintiff sought for a declaration of his proprietary right to two houses in Doomtollah Street, and also to recover from the defendant the rent of the same from the 1st of October 1860 up to the 17th day of August 1862. It appeared that one Matthew Miranda died on the 9th of October 1824, leaving behind him a will which contained the two following clauses, *vis. :*

" 1.—I give and bequeath my house situate No. 34, Doomtollah, to my daughter, Mrs. Elizabeth Han, at present occupied by her, with the condition that she will not dispose or mortgage the said house, but only enjoy the rents during her life, and after her death to go to her children on the conditions abovementioned—that is to say, only the rents of the said house to be divided in equal shares, and the survivor of them to get the house.

" 2.—I give and bequeath to my son, Pascal Miranda, the small lower-roomed house, at present tenanted by Mr. John Gomes, and adjoining the one occupied by my daughter, Mrs. Elizabeth Han, on the same conditions as abovementioned."

The whole question as between plaintiff and defendant turned upon the construction to be given to these two clauses. Mr. Newmarch contended, on behalf of his client, that the words "get the house" were sufficient to convey the "entire fee," while Mr. Graham argued that they only conveyed "a life-interest" in the property.

Mr. Justice Morgan said he was of opinion that the word "house" as occurring here must be taken to mean the "fee." The testator, after dealing carefully with particular interests, winds up with an unqualified gift to the survivor. If the survivor only took a life-interest, the remainder would be undisposed of; whereas the testator had expressly notified his intention of disposing of his whole estate. The survivor must, therefore, be held entitled to fee.

It was arranged that the defendant should give up the rent asked for, and that the plaintiff should defray the costs of the suit.

Decree accordingly.

LUTCHMEPUT DOGARE vs. SIBNARAIN MUNDLE AND OTHERS.

Service of a summons intended for one Partner upon another Partner of the same Firm is not a sufficient service.—Partners are not the recognised Agents of each other within the meaning of clause 2, section 17, Act VIII.

Mr. Bell for the plaintiff.

Mr. Justice Wells.—The defendants are stated in the plaint to be carrying on business as co-partners; and a copy of the summons intended for the defendant Sauphulram Mundle, who is residing at Purneah, was left with one of the other defendants at his dwelling-house in Calcutta; and I am asked to hold that this is a sufficient service on the defendant, Sauphulram Mundle, under clause 2 of section 17 of Act VIII. of 1859, which is as follows: "Persons carrying on trade or business for or in the name of parties not within the jurisdiction of the Court in matters connected with such trade or business, only where no other agent is expressly authorized to make such applications or appearances." The words, "where no other agent is expressly authorized," imply that the persons so carrying on trade or business for or in the name of parties not within the jurisdiction of the Court are purely agents, and the words "carrying on trade or business for or in the name of parties not within the jurisdiction of the Court" refer to a gomastah or agent, and not to a partner. Gomastah or agent is a person who is frequently employed to carry on business for or in the name of absent principals; but not so a partner, who cannot be said to carry on business for or in the name of other persons, as he carries on business in the name of the firm and for the benefit of himself and partners. It is true that under the old practice service upon one partner was deemed to be good service upon another; but it is to be observed that an old suit could never be heard, if instituted on the Plea side in less than two months, or, if instituted on the Equity side in less than three or four months, from the date of institution; so that defendant had ample time to come in and dispute the fact of his being a partner. But, under the Procedure Act, a suit may be heard and decided in eight days from the date of institution; and, unless service is either personal or upon a recognized agent within the meaning of section 17 of the Act, a defendant, who may not be a partner, though sued as such, may not receive notice of the suit till after decree, and may, in consequence, suffer great injustice.

The plaintiff may, under Rule 3 of the Rules of the 1st October 1862, take a verdict against the defendants who have been personally served without prejudice to his rights as against the other defendant,

SUBATOLLAH SIRCAR vs. T. A. THOMPSON.

Practice.

Where a defendant shews bona fides, by offering to pay anything like a fair proportion of his debts, a reasonable time will be granted to enable him to pay the residue.

This action was brought to recover the sum of Rupees 905. The debt was admitted by the defendant, who at the same time proposed to pay Rupees 400 within a week, and the remainder afterwards.

Mr. Justice Wells.—I entertain a very strong opinion respecting cases of this description. Act VIII. is altogether a plaintiff's Act; and since the change in the procedure judgment can be obtained within eight days, giving a defendant no time to turn himself about, or to obtain the assistance of his friends, as formerly he might have done. Under these circumstances I consider that I am bound to see that the defendants suffer no hardship. I have, therefore, determined that whenever a defendant shews his *bona fides* by offering to pay anything like a fair proportion of his debt, I shall grant him a reasonable time to pay the residue.

WEGUELIN vs. MOFFATT.

Practice.

Act VIII. of 1859 gives the Court no power to allow a Plaintiff to be amended after it has been admitted, except for the purpose of adding Parties.

Upon this case being called on for final disposal, Mr. Woodroffe applied for leave to amend the allegation of jurisdiction in the plaint, by striking out an erroneous description of the defendant's residence, and inserting an allegation of jurisdiction under the discretionary powers vested in the Court by sections 29 and 32, Act VIII., 1859.

Mr. Justice Wells.—The sections relied on by the learned Counsel apply to the preliminary investigation of plaints by the Court, and not to the stage at which this suit has arrived. The Court has no power under the Procedure Act to allow a plaint to be amended after it has been admitted and registered, except for the purpose of adding parties under section 73. I must, therefore, refuse the application; but the plaintiff may, under section 97, if so advised, apply for permission to withdraw from the suit, with liberty to bring a fresh suit for the same matter.

IN THE MATTER OF HOLMES.

Habeas corpus.

The father, if a proper person, cannot be deprived of his legal right to the custody of his legitimate children of whatever age—2 and 3 Vict. c. 39, which gives a discretionary power to a Judge in England, has not been extended to this country—Therefore the law applicable to cases which occurred in England previous to the passing of that Statute is applicable here.

Mr. Piffard for Mr. John Thomas Holmes.

Mr. Doyne for Mrs. Caroline Albina Kelner Holmes.

Sir Mordaunt Wells.—This is an application by John Thomas Holmes to obtain from his wife, Caroline Albina Kelner Holmes, the custody of their children, Francis Seaton Holmes, Caroline Chisholm Holmes, and George Percy Holmes. The children are now produced under a writ of *Habeas corpus* granted by me on the 9th instant. It appears that some time in 1860 the petitioner's wife, in consequence of unhappy differences between them, left her husband's protection, and proceeded to the house of her stepfather, George Chisholm, taking the children with her, and that she has, together with the children, remained with Mr. Chisholm ever since. No imputation is made either by the husband against the character of the wife, or by the wife against the character of the husband; and I am called upon to determine whether the husband or the wife is, under the circumstances, entitled to the legal custody of the children. The law relating to the custody of infants is one of extreme difficulty. Both as regards Courts of Equity and Common Law in England much is left to the discretion of the Judge, which discretion is necessarily exercised according to the varying circumstances of each case. The general rule in England is that the legal power over infant children belongs to the father, and that, during his life, the mother has none. *Blacks.*, vol. I., p. 433. The law is perfectly clear as to the right of the father to the possession of his legitimate children of whatever age they may be. See *ex parte McClelland*, 1 Dowl. P. C. 34, and *ex parte Glover*, 4 Dowl. P. C. 293. In a recent case, *Ryder vs. Ryder*, 30 Law Journal, N. S., p. 44, on an appeal from the order of the Judge Ordinary (Sir C. Cresswell) the discretionary power of a Judge is clearly and distinctly laid down; and in that case the Court acted upon the authority of *Rex vs. Greenhill*, 4 Ad. and El. 640, and

the *Queen vs. Clarke (in the matter of Alicia Race)*, 7 El. and B., p. 186, and *Blisset's case*, Laftt. 748.

The application of the law may sometimes have been exceedingly harsh as regards mothers, but now, in England, Courts of Equity are enabled to make regulations more in keeping with the dictates of humanity. This power was conferred on the Courts by the 2 and 3 Vict. c. 34—a most useful statute, but which has not yet been extended to India; and the present case must, therefore, be decided according to the law applicable to cases which occurred in England previous to the passing of that statute. If it had been proved that Captain Thomas was not a fit person to act as the guardian of his children, and there was reason to apprehend cruelty on his part, or contamination by profligacy or other cause, his strict legal rights would not be enforced; and I should not, in the exercise of my discretionary power, allow the father to have the custody of the children.

The desire of the wife to return to her husband is the best proof that his house is not an unfit receptacle for the children; and however much I may regret the deprivation visited upon the wife, my duty is clear and, under the circumstances, imperative; and I order the children to be delivered up to the father. I shall require an undertaking from Mr. Holmes that he will allow his wife, from time to time, to see her children, unless her future conduct should disentitle her to such a privilege.

[Mr. Holmes here stated that he intended to remove the children to Darjeeling, but that he was willing to allow his wife daily access to the children so long as they were here, and free access to them when removed to the Hills or elsewhere.]

MUDDOOSODEN DEY vs. BAMACHURN MOOKERJEE.

The meaning of an Act is to be gathered solely by reference to the Act itself.

In this case the point was mooted as to whether reference might be made to the official report of the proceedings in the Legislative Council for the purpose of assisting to interpret a clause in the Act of Council XIV., 1859 (Statute of Limitations).

Mr. Justice Wells said that it was his duty, as Judge, to interpret the Act solely by reference to the Act itself. He could not look into external sources of evidence for the purpose of ascertaining what was or was not the intention of the Legislature.

HEERALOLL CHUCKERBUTTY AND ANOTHER vs. MOHES CHUNDER

[GHOSAU & OTHERS.

Conspiracy—False action—Absence of Plaintiff.

Mr. Eglinton and Mr. Woodroffe for the plaintiffs.

Mr. Wilkinson for the defendants.

Mr. Justice Wells.—This is a suit to recover Rupees 552-15-3. The plaint states that the plaintiffs sold and delivered to the defendants on two different dates cloth to the value of Rupees 912-15-3, *vis.*, on the 24th of November 1862 to the value of Rupees 148-4-3, and on the 6th of December 1862 to the value of Rupees 764-11-0, and that the defendants paid to the plaintiffs on the first-mentioned date the sum of Rupees 100, and on the second-mentioned date the sum of Rupees 260, leaving unpaid the balance now claimed. The defendants have put in a written statement, which, in effect, is a general traverse of the plaint, and in which it is alleged that the plaintiffs—one of whom is a minor, and the other, though of full age, is not more than 17 years old—have no trade or business, and have been put forward in this action by their uncle Mothoormohun Mookerjee, who is at enmity with the defendants in consequence of a feud relating to a tank which has been the subject of some litigation in the Mofussil.

The following issue was framed and recorded :—

“Whether the plaintiffs are entitled to recover from the defendants the sum of Rupees 552-15-3, or any part thereof, on account of goods sold and delivered.”

Having heard the evidence on both sides, I have come to a conclusion adverse to the plaintiffs, and believe that this suit has been brought with a view to carry out, through the medium of this Court, a foul conspiracy, of which the defendants are the objects and intended victims. I am the more convinced of this, the more I look at the conduct of the parties and the improbabilities surrounding the plaintiffs' case. Though the amount claimed is small, the circumstances disclosed in the evidence invest the case with an importance which would otherwise not belong to it.

With reference to the allegation in the written statement that the plaintiffs have no trade, the defendant Moheschunder Ghosaul says that he does not know whether the plaintiffs have a shop, and the other defendant, Chunder

Mohun Ghosaul, says that Mothoormohun Mookerjee deals in cloth, but not the plaintiffs. The evidence on this point is not conclusive. Bhugwan Chunder Mookerjee, who calls himself the plaintiffs' gomastah, at first said that the plaintiffs' shop had existed for four years; he afterwards corrected himself, and said that the business was started about a year and a half ago: he also said that, when he was employed, he was told that Mothoormohun Mookerjee was in Calcutta, and would supply money. As Mothoormohun was to supply the requisite funds, it is probable that the business was his; but if not, there can be no doubt that he was interested in and managed the business, as his nephews are both young, and have not yet assumed the management; so that in either case he, the real plaintiff, is responsible for this suit. Bhugwan Chunder, who is called by the plaintiffs as their principal witness, has admitted that he is a relation of Mothoormohun, and consequently of the plaintiffs, and also that he was a party to a suit against the defendants. He is therefore interested for the plaintiffs and Mothoormohun, both as a servant and relation, and is naturally biassed against the defendants, who were successful in a litigation in which he was opposed to them. He has sworn that he gave the defendants credit, because they were neighbours and friends. I cannot believe that they were friends; but if they were friends as well as neighbours, and if the defendants are really dealers in cloth, how is it that they never dealt with the plaintiffs before? The fact of this being the first transaction between them is strong to shew, either that the defendants were not dealers in cloth, or were not, as they say they were not, on terms of amity with the members of this family. If they were not dealers in cloth, they could not have dealt with the plaintiffs; nor are they likely to have dealt with the plaintiffs, even supposing they were dealers in cloth, if their relations were otherwise than friendly.

Bhuggoban Chunder says that the defendants purchased cloth from him on the 24th November, and that they came again on the 6th December, and purchased more cloth. One would imagine that they would have bought sufficient on the first occasion, so as to save themselves the trouble and expense of returning to Calcutta so soon. Who are the defendants? The case of the plaintiffs is, that they are dealers in cloth, though they themselves say in the most positive terms that they have never purchased cloth for the purposes of trade, or sold any. If they are dealers in cloth, how easy to have proved this either by calling merchants from whom they have from time to time obtained their supplies, or by putting in the witness-box some of their numerous village customers. But neither merchant nor customer has been called, although

it is impossible that the defendants could have carried on the trade in cloth without its being well known both in the bazar and in their own village. In lieu of witnesses of either of these classes, two persons are called Ram Chunder Doss and Hurrymohun Bonnerjee. Ram Chunder Doss, who represents himself as the sircar of Lallbehary Mitter, deposes to having on one occasion sold cloth to the defendants : he does not say when or to what amount, and produces no books, and I cannot believe him in preference to the defendant, Moheschunder Ghosaul, who says he does not know Ram Chunder Doss, and has never had any dealings with him, or, in preference to the united testimony of both defendants, that they have never dealt in cloth.

It is a circumstance of some significance that the sircar of Lallbehary Mitter was called, but not Lallbehary himself or any other merchant, although the transaction deposed to by Ram Chunder Doss, and the transactions deposed to by Bhugwan Chunder, could not have been the only transactions of the defendants in cloth, if they were really dealers in cloth. The other witness, Hurrymohun Bonnerjee, who is supposed to come from the same village as the parties to this suit, says : "The defendant Chundermohun tells me that Bhugwan Mookerjee has brought an action against us ; you interpose and get it settled : " He also says : " The defendant used to sell cloth in the hauts. *

* * I have never bought of them * * * I know they deal in cloth, because we live in the same village." He afterwards said that his house was not where the plaintiffs and defendants live ; if the fact be so, it is not true that he knew the defendants dealt in cloth, *because* he lived in the same village with them. The defendant Chundermohun Ghosaul was never asked as to the conversation spoken to by Hurrymohun Bonnerjee about a compromise ; but the defendant Moheschunder Ghosaul denies all knowledge of any such conversation, and says that Hurrymohun Bonnerjee belongs to the opposite party. It does not appear who or what Hurrymohun Bonnerjee is, nor why he in particular should have been selected as the best person to bring about a compromise, or why he should have been called to speak to the defendants being cloth dealers, when he has never dealt with them, and does not, as it now appears, belong to the same village. I distrust this witness, and cannot act upon his evidence.

Mr. Eglinton in his able speech relied very much on the entries in the books and their production in Court. But these books, as they have not the signatures of the defendants, prove nothing, and are of no value ; for what is so

easy in this country as to produce books forged from cover to cover, whenever a case requires to be supported by such evidence? The defendants have been credited with sums received on account; and it is said the money was paid on both occasions in silver, and not in notes. Notes could be traced and identified, but not so silver, and it is therefore convenient to say that payment was made in silver. The defendants deny having paid the sums with which they have been credited, or any other sum, and I have no reason to doubt the truth of their denial. The plaintiffs are not taken by surprise in the defence set up, as the written statement of the defendants alleges in substance that the case is a conspiracy.

It appears from the evidence of the elder defendant that a series of suits had been going on in the village, in all which the father of Mothoormohun had been unsuccessful, and that this had led to enmity and cast ill-feeling; and we know how bitter this is when it exists. The attitude of the parties being hostile, it is impossible to believe that the defendants could have gone to the plaintiffs' shop to make purchases, or that the plaintiffs could have dealt with them as approved customers, and given them credit. The defendant subpoenaed Heeraloll, the adult plaintiff, and Mothoormohun, the man best able from his position to give evidence on these matters; but they have both neglected to appear. Mr. Eglinton, knowing how necessary it was to his case to account for the non-appearance of these men, strenuously endeavoured, in his cross examination of the clerk who served the subpoenas, to show that service had not been properly effected; but the cross-examination failed in its object. Mothoormohun is doubtless now in Calcutta pulling the strings, and is the chief mover in this transaction. He knows the nature of the defence, and, though served with a subpoena this morning in Calcutta, he has not ventured to appear. Why is he absent? The question is not answered; but his absence is consonant with the doings of a man who does not hesitate to send to this Court wretched servants suborned to move his case by false evidence. Heeraloll, too, though served with a subpoena, has kept away; and I have no doubt he has done so with a view to avoid answering questions, which would shew that he was the mere tool of his uncle. This action is brought for the purpose of revenge; and we know to what lengths the natives of this country will go to attain such an object when once they set their minds upon it. Mothoormohun has got up this case, knowing that a verdict, if obtained against the defendants, who are men in humble circumstances, would cause their ruin.

It was said by Mr. Eglinton that if this case is a conspiracy, it is surprising

the plaintiffs should have claimed so little ; but the reason why they have not claimed more is to make the case appear more probable, and likely to take with the Court. The transactions are made to take place on different days : books are put in shewing payments on account, and one of the sircars of the plaintiffs speaks of a meeting at the village which led to the alleged sale ; and all those little touches are added to give probability to the case. The plot, though well laid, has failed in its purpose. The defendants have called a chowkeedar of the village—a man, no doubt, in a very humble position, but nevertheless well qualified to give evidence—as to the occupation of the defendants and the existence of the feuds to which reference has been made. No one could know more about his neighbours and their doings than Shaik Dhory, a man whose occupation left him ample time to go about gossiping from house to house smoking here with one villager and there with another. He entirely confirms the defendants in their statement.

I am satisfied upon the evidence that no goods were ever sold or delivered by the plaintiffs to the defendants, and that this is a false action instigated by Mothoormohun Mookerjee for his own purposes. I therefore find the issue for the defendants, and dismiss the suit with No. 2 costs.

Appellate Jurisdiction.

(Before the Hon'ble the Chief Justice and the Hon'ble Mr. Justice Levinge.)

HEERALOLL CHUCKERBUTTY AND ANOTHER *vs.* MOHESCHUNDER GHOSAL AND ANOTHER.

The High Court sitting in appeal on questions of fact is guided by the same rules as those of the Privy Council when they sat upon motions for a rule for new trials from the old Supreme Court.

The High Court sitting in appeal will not disturb a judgment upon a question as to the credibility of witnesses, unless it be manifestly clear, from the probabilities attached to certain circumstances in the case, that the Court was wrong in the conclusion drawn from such evidence.

The High Court sitting in appeal will look upon the decree of a Judge as to facts in the same light as the verdict of a Jury, and though some of the reasons

given for the conclusion arrived at be erroneous, the High Court in appeal will not say that the decree is against the weight of evidence, if sufficient reasons for such decree still remain.

Mr. Eglinton and Mr. Woodroffe for the appellants.

The Advocate-General and Mr. Wilkinson for the respondents.

Mr. Eglinton and Mr. Woodroffe for the appellants submitted that the judgment of the Court below was wrong, and that upon the evidence the learned Judge should have found for the plaintiffs. The judgment was mainly founded upon an assumption not warranted by the evidence, namely, that a third party, not before this Court, Mothoormohun Mookerjee, had influenced the plaintiffs, his nephews, to institute his present suit by way of retaliation, the defendants having succeeded in other proceedings between them in the Mofussil Courts. Mothoormohun had not been called by the plaintiffs, and there was evidence that he had been subpoenaed by the defendants, but he did not attend at this trial. Had the plaintiffs been aware of the defendants' case before the trial commenced, no doubt the omission by the plaintiffs to produce him would have been fatal to that case. But it was not so. The learned Judge had not directed written statements to be filed; the plaintiffs, therefore, were taken by surprise, and were wholly ignorant that any case of fraud, through the instrumentality of Mothoormohun or any one else, was to be set up; hence they came into Court with only the ordinary evidence required to prove a common case of goods sold and delivered. With regard to defendants' own subpoena, the service was doubtful, and, naturally, the plaintiffs were not in a position to contradict it under the circumstances. The same observation applied to the service on the younger plaintiff, whose evidence was not necessary to establish the plaintiffs' case, and he had, therefore, not been called to support the action. The proof of notice failed in its inception. What were these legal proceedings of which, it had been said, there was so much evidence. The only such, if any, was the record of an appeal case between Mothoormohun's father and the elder defendant, dated so far back as 1856, which had led to ill-feeling; and it was stretching the argument to a great length to urge this as a motive for conducting and putting into operation so gross a fraud as this action was said to be in 1863. Again, the defendants were persons of means; and had Mothoormohun really wished to crush them as suggested, he would not have sued for so small a sum as Rs. 560, which the defendants could at once pay, but would rather have brought an action for an amount which it would have been beyond their means to satisfy. With

regard to the sale and receipt of the cloth, no doubt a direct conflict of testimony existed. But the plaintiffs, on the one hand, produced their books in which the transactions appeared, whilst the defendants, on the contrary, in no way supported their case, that at the time of the alleged sale one at least of them was at his native village. No evidence had been called to support this. The direct evidence to connect Mothoormohun with the case wholly failed. It was proved, and had never been denied, that he was at the defendants' solicitor's office shortly after the institution of the suit, and had met the defendants there, who said that they saw him pointing them out to parties whom, it was to be presumed, he intended subsequently to produce as his own witnesses. This theory was valueless on the face of it. Mothoormohun was and had long been himself a client of the defendants' attorney. He was there on business of his own, which he subsequently transacted. In the course of it he alluded to the pending action, in which, as being the uncle of the plaintiff, he might reasonably be allowed to take an interest. That was conduct wholly inconsistent with fraud. A man engaged in the instigation of a false suit for the purpose of revenge would not choose the office of the defendants' solicitor as his scene of action; neither would he, whilst the suit was pending, converse uninvited with the defendants' solicitor about it. On the whole, the evidence as to the existence of a conspiracy or of *mala fides* wholly failed, and under these circumstances, the plaintiffs having made out a *prima facie* case, which had not been rebutted by satisfactory evidence, the decree should be reversed.

Counsel for the respondents were not called upon to reply.

Sir Barnes Peacock, C.J.—This is an appeal from a decree of Mr. Justice Wells, made in an action for goods sold and delivered, and tried before him on the 17th April last. The ground of appeal is, that the decree was against the weight of evidence, and that the learned Judge ought to have found that the goods had been really sold and delivered. The appeal does not ask for a new trial; for the learned Judge, if the plaintiffs had been taken by surprise by the defence of the defendants, might have been asked to grant a new trial. It is said that a written statement had been filed by the defendants, and that the plaintiffs had not obtained a copy thereof before the trial. Whether they could or could not obtain a copy, this case was tried, as it would have been tried under the old rules of pleading, where the plea of *non-assumpsit* had been pleaded, and there was no statement of facts on either side, and neither party knew the case of the other side. Assuming that the plaintiffs

never saw the written statement, they would be in the same position at the trial as under the old practice. Surprise was the ground now put forward in argument for setting aside this verdict, which was very different from the ground set out in the memorandum of appeal, namely, that the verdict was against the weight of evidence. Ignorance of a case to be set up is not a ground for setting aside a decree. The question is, whether the learned Judge has substantially given a verdict against the weight of evidence. Because he might have given some reasons for his decision not quite satisfactory to them, their Lordships could not on that account say that his decision was against the weight of evidence. To a great extent this Court, sitting in appeal on a question of fact, is guided by the same rules as those of the Privy Council when they sat upon motions for a rule for new trials from the old Supreme Court. That rule is expressed in the case of *Musadee Mahomed Casim Sherazee vs. Meersa Ally Mahomed Shooshy and another* in 8 Moore's P. C. Cases 110. The question there was, whether the Court below was right in law or in fact. The Privy Council laid down this rule, "that that Court would not disturb a judgment of a Court in India upon a question of the credibility of witnesses, unless it was manifestly clear, from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusion drawn from such evidence." Credibility of witnesses was an important ingredient, and great weight was to be given to the Judge's opinion trying questions of fact; and Courts of appeal ought not to interfere, unless upon the clearest grounds. The amount of credibility to be given to the evidence of witnesses rested in a great measure with the Judge who heard the evidence; therefore if the Court looked at this decree as a verdict of a jury, how was it to deal with the case? It stood thus: Two plaintiffs brought actions, who were stated by their own witnesses to be about 21 or 22 and 14 or 15 years of age respectively; they are supposed to have been in partnership, and when they commenced, about a year ago, the youngest would have been about 13 years old. Where they lived was not clearly shown, and where a young gentleman of 13 years got his money to carry on a wholesale business did not appear. The gomastah of the plaintiffs said their uncle Mothoor-mohun had shops in Burra Bazar, and they had told him that he would supply them with money, if required. In the gomastah's evidence there appeared some confusion as to the time when the business was commenced. He first said it was four years ago, and afterwards stated that it was about one year. The book produced in evidence showed the first transaction to have been in Bysack 1269, just about a year since. He also stated he was

in the country before going to the *Doorga Poojah*, and that he saw the defendants. He said : "I have sold cloth to the defendants. They came to our shop. On the first occasion they bought Rupees 148 odd annas' worth of cloth. They said : 'We have previously spoken to you to receive Rupees 100 from us and give us cloth.' This book produced is kept by me. This entry (2) is in my handwriting. I delivered to them the cloth, and received Rs. 100 on account. The defendants saw me make this entry. Subsequent to this I had transactions with the defendants. On the first occasion Moheschunder, the old man, took the cloth. The second entry (3) is on the 22nd Aughran (6th December 1862). I delivered cloths on this occasion to both the defendants who were present. On that occasion, when they took away the goods, they paid Rs. 260. This book produced is another book ; it is the ledger of the plaintiffs' firm. The entries are in my handwriting. Whilst they were taking the cloths, and one person was taking delivery of the cloths, I made the entries. A sircar, Unnoda Chatterjee, delivered the cloths. He is sole sircar of the firm. He delivered on both occasions. Defendants and we are neighbours at the village of Gungapore. I saw them shortly before I had gone to my home at the *Doorga Poojah*, and they said to me : "Brother, you have a cloth-shop, and you assist many persons ; so if you assist us, we will make payments on account." I said : 'Yes, I will assist you.' It was with reference to the transaction of Rs. 148 that they said : 'You have promised ; now give us.'" The next witness said : "We two sircars sold goods." He might have meant "I and the gomastah." The statement of the defendants was, that they were not in Calcutta on those days. This action was brought on the 25th of March, and tried on the 17th April last. It was five months after the transaction, and it was contended that if they had not been in Calcutta on these dates, the defendants could easily have proved an *alibi*. But if they were in the habit of coming occasionally to Calcutta, this would be very difficult indeed to prove, and, like most attempts to prove an *alibi*, would have failed. The elder defendant swears positively he did not buy cloth or pay any money. It was not stated in his evidence that he was not in Calcutta on either of those days ; nor was he asked the question by either party : probably it was an oversight. It might have escaped the plaintiffs' Counsel to ask him where he was on those days. Still he swears he never purchased any cloth of the plaintiffs. The gomastah swore that both defendants came on the second occasion whilst the younger defendant most positively denied that he was in Calcutta at all. If he was to be believed, then the gomastah must be incorrect as to

him. His Lordship doubted whether either of the defendants could have brought witnesses to prove such an *alibi*. It is said by the plaintiffs that they could not have been aware that the defendants would deny having been in Calcutta, or having purchased the goods. If the plaintiffs had seen the written statement of the defendants, they might have anticipated this. His Lordship believed that Heeralall was served with a subpoena, and that he refused to come and give evidence; also that the uncle, Mothoormohun, was served, and that he, too, did not choose to come. If the plaintiffs were taken by surprise, it was not for their Lordships sitting in appeal to say they disbelieved the evidence because of the alleged surprise. They were now called upon to say that the evidence was so strong in favour of the plaintiffs that the Judge in the Court below, sitting as a jury, acted wrongly. If the jury had to decide the question, could their Lordships say that they ought not to have so decided? The Judge believed the evidence of the defendants. The defendants appeared and gave their evidence on oath: the plaintiffs did not appear at all. Sometimes parties of high caste will not appear in Court, but it was not the case here; for both Mothoormohun and the plaintiffs were present in Court. The learned Counsel for the appellants ask us to hear their evidence. Is this a case for a Court of appeal to say they will call them? We think not. The plaintiffs were not absent from the trial on account of any religious prejudices; therefore it was probable their absence arose from some improper motives. The learned Judge below was far abler to judge of the credibility of the witnesses than this Court, and he believed that the plaintiffs and Mothoormohun were served with a subpoena. The plaintiffs might have asked for a postponement. The Court was told by the Counsel for the appellants that there was gross fraud, perjury, and conspiracy on one side or the other. The two defendants had given their testimony on oath. Was the Court to say that the perjury was on their side, when the plaintiff and his uncle, Mothoormohun, who had been called, refused to come and pledge their oaths against the defendants? How then could the Court say, under these circumstances, that perjury was on the side of the defendants? Looking at the decree of the learned Judge as a verdict of a jury, and not the reasons which he gave for coming to the conclusion he did, though some of his reasons might be erroneous, still, if sufficient reasons still remained, the Court was not to say that it was a decree against the weight of evidence. Therefore, looking at the whole case, their Lordships considered that the learned Judge in the Court below came to a right conclusion upon the evidence, and accordingly dismissed the appeal with costs.

ORDINARY ORIGINAL JURISDICTION.

In the Matter of Himnauth Bose.

The legal age of discretion for Hindoos in India is uniformly sixteen years. Up to that age the Father has an undoubted right to the custody of his Children.

Mr. Bell appeared in behalf of the Rev. Lall Beharry Dey and Dr. Alexander Duff, in compliance with a writ of *Habeas corpus* issued yesterday, calling upon those two gentlemen to shew cause why a Hindoo boy, by name Himnauth Bose, should not be delivered over into the custody of his father, Callyprosono Bose. He said that the writ of *Habeas corpus* had been issued upon the affidavit of Callyprosono Bose, which was as follows: "I, Callyprosono Bose, of Guspar, in the Twenty-four Pergunnahs, Assistant in the Public Works Department of the Government of India, make solemn affirmation, and say—

1.—That the abovenamed Himnauth Bose is my son, an infant under the age of sixteen years—to wit, 15 years and 2 months and 9 days.

2.—That until Tuesday, the 16th June 1863, he resided with me under my guardianship as his father.

3.—That on Tuesday, the 16th day of June last, he left home for the purpose of attending school at the Calcutta Training Academy, and has not since returned.

4.—That I have ascertained that he has been since that day, and is now, in the custody of Lall Beharry Dey and Dr. Alexander Duff, at the Native Mission House, Cornwallis Square; and I have applied to the said Dr. Alexander Duff and Lall Beharry Dey to return him to his home, but the said Dr. Duff and Lall Beharry Dey refused to allow me to remove the said Himnauth Bose, and still detain him against my consent, I being his natural guardian.

5.—That I am informed, and verily believe, that the object of the said Dr. Duff and Lall Beharry Dey in detaining my son is to induce him to abjure the Hindoo religion, my said son being still a minor and incapable of forming a correct judgment on the step he is advised to take. I am desirous that the said Himnauth Bose should remain under my care and guardianship until he attains his majority.

(Sd.) CALLYPROSONO BOSE.

Mr. Bell, having read through the affidavit, observed that in consequence of the writ being made returnable at so early a date, his client had been unable to put in a written return. The purport, however, of the return which

would be put in was to the effect "that the boy was not detained against his will, but remained in the Mission House of his own free will and accord." The young man, or boy in this instance, was within 9 months and 21 days of attaining his majority according to Hindoo law. The leading case on this question was that of *Regina vs. Ogilvie* (Taylor's Reports, p. 137). This case was very fully argued by Mr. Dickens and Mr. Morton on the one side, and Mr. Clarke on the other. The writ was in that instance directed to one James Ogilvie, of Cornwallis Square, in the Town of Calcutta, commanding him to bring up to the Supreme Court the body of Radacaunt Dutt, an infant under the age of 16 years, alleged to be detained in his custody. In that case it was ruled by Sir Lawrence Peel that, "When an infant supposed to be improperly in custody is brought up on *Habeas corpus*, the Court will (if the infant appear to be capable of exercising a sound judgment and discretion) allow him to depart wherever he lists: minority simply will not entitle a father to the custody of his child."

Mr. Justice Wells said that in the event of his examining the boy, he should certainly allow him to remain for a quarter of an hour in a private room in communication with his father.

Mr. Bell said that he should prefer that his Lordship would examine him without such interview.

Mr. Justice Wells said he should wish the child to see his father first. He had not, however, made up his mind to examine him at all.

Mr. Bell said that the judgment of Sir Lawrence Peel had been given, notwithstanding very strong cases cited upon the other side, and amongst them the case of *Brijonauth Bose* quoted by Mr. Clarke. "That was a case in which the boy was admitted to be past 14 years old. He had voluntarily gone to the Missionaries. He protested against being delivered up to his father, and declared that he was a Christian, and that his family would murder him. He clung to the table of the Court House, and screamed violently, but the Court decided that they were precluded from interfering with the right of a Hindoo father, and desired the latter to remove him, which was effected after considerable resistance by the son in the presence of the Court." Sir Erskine Perry, in his *Oriental Cases*, had given a judgment at variance not only with the Court here, but also with the Court at Madras; but the principle laid down in the case reported by Mr. Taylor, and arrived at after mature deliberation by one of the most learned Judges on the Bench, Sir Lawrence Peel, was, "that the Court

will take into consideration the question whether the child does or does not possess sufficient intelligence to enable him to judge for himself."

Mr. Justice Wells asked the learned Counsel whether he knew of any case in England which went the length of that decided by Sir Lawrence Peel? He himself knew of no case in England where the father was deprived of the right to educate his child in whatsoever religion he pleased, such child not being of age.

Mr. Bell said that the case before the Court was as to "whether the child was or was not improperly detained." If it should appear that the child was not detained against his will, and that he was of sufficient intelligence to decide as to where he would remain, he (the learned Counsel) submitted that the Court would be wrong to interfere by writ of *Habeas corpus*, whatever right it might have, if applying the principles of a Court of Equity on an application to it as such Court.

Mr. Justice Wells put the case of a child belonging to strong Protestant parents being detained by a Unitarian, and asked whether the Court would be right in keeping it from its parents.

Mr. Bell observed that if a child was of an age, and able to form an opinion, he was entitled to choose for himself.

Mr. Justice Wells enquired whether the learned Counsel meant to say that a boy of 15 was capable of forming an opinion on the subject of Theology, and whether he did not think it right and proper that parents should have the power to instruct their children in whatever religion they deemed the best.

Mr. Bell said that he wished to make the question a dry question of law, and the first thing to be looked at was the nature of a writ of *Habeas corpus*. It was a writ to show why a person is detained, and whether or not he is kept in illegal custody.

Mr. Justice Wells put the case of the Court being of opinion that the child was incapable of forming a sound opinion as to religion. Would the Court be justified in depriving the father of its custody?

Mr. Bell observed that this was not the first occasion on which the question had been agitated. There was an important decision in the case of the *Queen* vs. *Nisbett*, reported in the *Free Church Missionary Gazette*.

Mr. Justice Wells said that he could not admit that report. A report

in any ordinary paper he was willing to receive, but not in a paper of a controversial nature.

Mr. Bell said the case was evidently the one referred to in *Perry's Oriental Cases*, p. 103, but he would not press that the report was admissible. The case in *Perry's Oriental Cases* would be relied on on the other side as being contrary to the decisions in Calcutta and Madras, and he submitted that the Calcutta ruling was the most correct. The principle was correctly stated in Sir E. Perry's note: "The principle on which the Supreme Court of Calcutta decided was that the writ of *Habeas corpus* was only intended to prevent illegal restraint, and that if the child, on being brought into Court, did not appear to be under illegal restraint, and was of an age to choose for himself, the Court would allow him to exercise his own discretion where he would go. And as the boy in this case, who had been a pupil in Dr. Duff's school, and was a convert to the Christian religion, was about 16 years of age, and expressed a wish to remain with Dr. Duff, and not to go to his father, the Court allowed him to do so." He (the learned Counsel) had no doubt that his friend Mr. Newmarch would lay great stress upon the case of *The Queen vs. Clarke in re Alicia Race*, and it was necessary before going to that case to refer to *Whitty vs. Marshall*, 1 Young and Collier Chancery Cases, p. 68. That case shewed that before deciding whether the child should go to its guardians, the Court would examine the child itself.

Mr. Justice Wells observed that there was a wide difference between a guardian and a father.

Mr. Bell said that in the case referred to the guardians were appointed by the father. The case of *Alicia Race* in the *Queen vs. Clarke* (a), as it referred to the case of the *Queen vs. Nisbett* decided by Sir E. Perry (b), would of course be referred to by the other side as an important case. The rule was that between 7 and 14 the Court ought to call up the child, and examine him to see whether he had sufficient intelligence to enable him to decide. Up to 14, undoubtedly, the person who was guardian for nurture had clear right to maintain an action of trespass against any one taking a child out of his custody. The case of *Alicia Race* was not parallel with the present case. Children attained maturity here earlier than in England.

Mr. Justice Wells said he thought an English boy of 15 quite as clever as a Hindoo boy of the same age.

(a) 7 E. and B. 136. (b) Perry's Orient. Ca., p. 103.

Mr. Bell observed that he could not see anything which could carry the guardianship for nurture further in India than in England, where it lasted only up to 14 years. He thought it ought to be rather restricted than extended here, but let the same age be fixed in both countries. That age was 14. The boy then ought to be called upon to decide. There was no necessity to put him in a private room with his father. He might be examined openly by the Court. *Dr. Duff* had no wish to detain him against his will.

Mr. Justice Wells observed that he did not like any system which interfered with nature. He should not like to see his own child kept away from him.

Mr. Bell asked whether these gentlemen were to turn the boy out of doors.

Mr. Justice Wells put the case of the son of a very earnest Christian detained in the hands of a Brahmin, and asked what would be the feelings of the parent under such circumstances.

Mr. Bell admitted that such a circumstance must necessarily cause great pain to the Christian parent, and so it must be in the case of the Hindoo. Still it could not be said that, under a writ of *Habeas corpus*, the Court had the power to prevent these gentlemen from keeping the child within their doors, if he did not wish to leave. If he were of an age to judge for himself, the Court should allow him so to do. He submitted that this was the boundary within which the writ of *Habeas corpus* was confined. The Court would see that no person was detained against his will, and that was all. He submitted that, reviewing the whole circumstances of the case, the proper course was to examine the child, to see whether he was willing to return to his father, and, if he were not willing, to allow him to remain with those learned gentlemen in whose hands he then was.

Mr. Newmarch, who appeared on behalf of the father, submitted that the Court was at liberty to decide this question unfettered by the case of the *Queen vs. Ogilvie* (Taylor's Reports, p. 137), because that case, if not entirely overruled, was, at all events, much shaken by the case of the *Queen vs. Clarke* (7 E. and B. 136). The Court in this case ought to apply the principles laid down in the *Queen vs. Greenhill* (4 Ad. and El. 624). It was noted in that case that the simple enquiry ought to be as to "whether the child had or had not arrived at years of discretion," and also that such enquiry should be directed to ascertaining a general age of discretion applicable to all cases, and without any reference to the greater or less intelligence of any individual child whose case might be before the Court. Now, what was the age which the Court ought to fix

as the age of discretion in the case of a Hindoo infant? The English age of majority was 21: this was so late that the Courts had thought fit to admit that the infant was capable of some discretion at an earlier age, and this age was fixed at 14. In this country it would be found that no such difference was made between the age at which majority and that at which discretion was attained. The age of majority was 16, and the Courts would do well to fix the age of discretion at the same period, the Hindoo law not having placed it at any earlier period. Would it be right for Courts here, merely because the Courts in England had limited the duration of guardianship for nurture to 14 years, on this account to apply the same state of things to the Hindoo community, and introduce a fanciful analogy? He submitted it would not be right. The Court ought rather to say that since a child in Hindoo law attains the age of majority at 16, no earlier limit was required for the attainment of discretion practically, and no other limit should be introduced. To look at the matter, it could hardly be seriously suggested that any child could have sufficient discretion before the age of 16 years to isolate itself from kith and kin, and to cast off, at once and for ever, all family ties. Yet, when a Hindoo child takes up the Christian religion, it takes up this penalty with it, and becomes an outcast, so far as its own people, its own family, its own country, are concerned. How great would be the probability that so important a step rashly taken by a person of tender years would be recalled by that person when in after life he found himself so isolated. Thus apostasy would ensue and consequent great scandal to the Christian religion. He thought that these gentlemen, the missionaries, whom no one respected more than himself, ought themselves to wish that the child should be sent back to his parents. He asked the Court to adopt the ruling in the *Queen vs. Greenhill*.

Mr. Justice Wells said that view had been strongly upheld in 12 C. B., p. 323, in the case of *In re Hakevill*.

Mr. Newmarch said that was so. The Court was precluded from considering what was the degree of intelligence of this particular boy. It must fix some definite period for all. Ought the Court to fix 14 simply because that was the age in England, or would it not rather be guided by the Hindoo law, which fixed the age at 16? The scandals which would arise to society, if boys were allowed to wander about from religion to religion, free and unrestrained, would be dreadful to think of. He was therefore of opinion that it would tend to carry out the views of these gentlemen, if the Court were to put a stop to this scandalous wandering about of infants, and say that, being

bound by the ruling in the *Queen vs. Greenhill* to adopt some general limit, it would fix it at 16 for Hindoos. Let a Hindoo boy remain under his parents' charge until he should attain that age, the Hindoo age of discretion. Having arrived at mature years, let him choose his own religion, and let us hope that that religion may be Christianity.

Mr. Justice Wells said that in this case he did not entertain the slightest doubt as to the course which he ought to pursue. He regretted extremely to see a gentleman of such extreme philanthropy and kindness placed as Dr. Duff was to-day. The question before the Court was not, whether the Christian religion was superior to the Hindoo or Mahomedan religion. He had no hesitation in saying that if a Judge were to determine such a question, he would be exceeding his authority. The question which he had to determine was, whether he ought to return to the father the custody of this child. He thought that Mr. Bell had scarcely applied his mind sufficiently to the allegations in the affidavit. He confessed that he should have been glad if Dr. Duff had put in an affidavit, denying the allegation in the first affidavit upon which the *Habeas corpus* had been granted, because it seemed to him to be an act of great injustice to detain a child from a Hindoo father.

[Here Mr. Bell interrupted his Lordship, and asked permission to put in the written Return which was now ready. His Lordship immediately granted the request, and the following document was put in :

" We, Alexander Duff and Lall Beharry Dey, in the within-named writ do hereby certify that the said Himnauth Bose is not and never has been detained in our custody, but that he, being a young man of intelligence and able to form an opinion for himself, did voluntarily, on the 16th day of this month of June, come to the above Lall Beharry Dey, the native clergyman in charge of the converts at the Native Mission House in Cornwallis Square, and begged to be allowed to live there, and that he has ever since lived there of his own free will and at his own request, and without being detained in any way by us; and that his father and all other persons, who have expressed a wish so to do, have been allowed to see him alone, he being free from all control, and that his father has had full access to him, and that he has not been detained from him; and that the said Himnauth Bose was repeatedly asked by us, in the father's presence, to exercise his own free will, and to depart from the Mission House, but that he refused to do so; and that the said Himnauth Bose by his own consent has agreed to attend this Court to-day."

His Lordship observed that the return which had been made was precisely the return which he understood would have been made. There was, however, a passage in the affidavit which he considered of the greatest importance, and which remained unanswered. That passage was: "That the object of the detention of the child was with the view of inducing him to abjure Hindooism and to embrace Christianity." The question which he had to determine in this case was, whether the applicant was entitled to the custody of his child; and though it was said that the child remained with Dr. Duff by its own free will, he read this to mean that the child had influence used over him, well meant, but indiscreetly, and in a way which the law would not recognise. Now, the boy in this case was 15 years of age, and if Dr. Duff had made an allegation to the effect that the father was an immoral man, he would at once have examined the child, whether the father were Christian, Hindoo, or Mahomedan. That question, however, did not arise here. There was no allegation that the father had misconducted himself, or that he was a person unfitted to take charge of the boy. He was called upon to decide in a case exactly analogous to one decided by the late Chief Justice of Bombay. The case which had been referred to as having been decided in Calcutta by Sir Lawrence Peel (*Queen vs. Ogilvie*) was decided on very narrow grounds; and he would, if necessary, have no hesitation in overruling it, in consequence of the decision in the case of *Queen vs. Clarke in re Alicia Race*. This was an appeal to the discretionary power of the Court, and that discretionary power must be exercised according to the law of the land. He regretted that the abovesentioned allegation in the affidavit must go forth to the public. He would have been well contented had it gone forth that there was no such object. It would, indeed, be a strange thing were it allowed to go forth to the millions in this country, that a child might be taken away from its parents to induce it to abjure the Hindoo religion. He thought it must be held that the rule established in England as to the discretion of infants does not hold at all in this case. He was of opinion that Mr. Newmarch had correctly stated the Hindoo law and the law of this Court, when he stated that in this country the parent was entitled to the custody of his child up to 16 years of age. There was a clear authority in the judgment of Mr. Justice Patteson, because although that judgment was not delivered *ex cathedra* it had since been adopted by, and so become the language of Lord Campbell. What was there, then, to prevent the father in this case from having the custody of his own child? It had been said, and no doubt truly said, by Dr. Duff, that he did not wish to rest on the child by force; but even the influence used by Dr. Duff and the other

gentleman associated with him was in itself a restraint. It was cultivating unnatural feelings in the bosom of the child, and repressing the love of the parent which ought not to be checked. No one knew more than Dr. Duff himself the strength of the paternal feeling, and surely he must see that there can be nothing Christian in keeping a child away from its parents. He would be sorry that any other idea should go forth to the world, and thought that the time had come when it should be decided whether any Christian Minister had a right to keep a Hindoo child from its parents. That being so, he would consider what had been the line pursued by the late Supreme Court in India. He had no hesitation in saying that the judgment of Sir Lawrence Peel was based upon the narrowest grounds, and that no Judge could uphold it after the decision in *Alicia Race*. Sir Lawrence Peel seemed to have thought that the mere technical rules established in some of the cases at home were to bind him here, and that the child had a right to be asked and to decide whether he would go to his parents or not. The Bombay case was the true one. If Dr. Duff were to ask him here to deliver up a child of his own in the custody of the Brahmins, could any one suppose that he would hesitate for a moment to take that child from the Brahmin, and deliver it up to Dr. Duff? Has not the Hindoo then the same right as the Christian to the custody of his child? He could not help thinking that every man of reflection would be of opinion that the views which he was expressing were sound views. If it were not so, where was the line to be drawn? We should have a system of forcible conversions carried on in India, the consequences of which would be lamentable indeed. He was spared the pain of deciding by himself against the judgment of Sir Lawrence Peel by the case of the *Queen vs. Nesbitt*. In that case the Court ordered a child of 12 years of age to be delivered up on *Habeas corpus* to his father. Quite apart from any other question, the law was entirely on the side of the conclusion at which he had arrived. Sir Erskine Perry said: "That the Court was not at liberty to draw any distinction between religions, or to favour one religion more than another." It might be that, under the present constitution of the Court, a Christian man might have to ask of a Hindoo Judge that which a Hindoo man was now asking of a Christian Judge. Would any examination by the Christian Judge as to the religion of the Hindoo boy give confidence to the Hindoo population, or would any examination of the Christian boy by the Hindoo Judge give confidence to the Christian population? He could not enter into anything of that kind. He must decide the case upon the principle laid down by Sir Erskine Perry and the learned Judges at

home. It would be impossible for him to enter into the question if he would, for every one knew that there were hundreds in this country professing Christianity who were Hindoos in heart. The child kept away from his parent, simply because the Missionaries endeavoured to make him do so. The Missionaries were the best of men, but they would not like to have their children taken away. He would not examine the child in this case. The question was one affecting all fathers. Supposing a father sent his child home to a school, and the school became a Mormonite establishment, and an application were made to the Queen's Bench for the delivery of the child, would any Judge refuse to deliver him up? The principle was the same here. The Court could not say, in its judicial capacity, that one religion was better than another. It must decide upon purely legal grounds. The decision in Bombay had been followed by the case of the *Queen vs. Lavinia Greenhill*, 4 Ad. and El. 621. In that case great misconduct was established against the father, but the Judges still held that the father was the proper guardian of the child. Lord Denman there said: "The Court, it is true, has intimated that the right of the father would not be acted upon, where the enforcement of it would be attended with 'danger' to the child, as where there was an apprehension of 'cruelty,' or of 'contamination' by some exhibition of gross profligacy." These are reasons which induce the Judges at home to deny to the father the custody of his children. The case of *in re Hakewill*, 12 C. B. 223, is always considered a leading case on this subject. The Return in that case was: "I am the father of these 6 children, and the Court has no jurisdiction to deprive me of the custody of them." Lord Chief Justice Jervis held that the Return must be allowed, and Mr. Justice Cresswell, Mr. Justice Williams, and Mr. Justice Talfourd were of the same opinion. The party who claimed the children in that case was the mother, and a mother's claim is incomparably greater than that of Missionaries, and she is ten thousand times more useful in influencing the religion of a child. To say otherwise would be to speak in opposition to common sense. Mr. Justice Patteson says of the case *Queen vs. Nesbitt* (*Oriental Cases*, p. 109) referred to by Sir E. Perry: "I cannot doubt that you were quite right in holding that the father was entitled to the custody of his child, and enforcing it by writ of *Habeas corpus*. The general law is clearly so, 'and even after the age of 14.'" Now, Mr. Justice Patteson was one of the ablest lawyers that England ever produced, and was also a man deeply imbued with the principles of religion. He was therefore admirably fitted to give an opinion, and the above words shew

how strong the learned Judge's opinion was as to the parent's right to educate the child in a religious point of view. The principle laid down by Mr. Justice Patteson and Lord Campbell ought to be clearly stated. He was not sorry that the task had devolved upon him. He thought that it was the duty of those gentlemen who had charge of the child to have delivered him up to his father in the first instance, and to have done that which he was now about to do.

His Lordship ordered the child to be given up to the father, which was accordingly done. The parties then left Court.

Note.—The opinion of Mr. Justice Patteson, and the principle therein advocated, is upheld by Chief Justice Cockburn. *Vide Queen vs. Howes* (*Law Journal*, N. S., Vol. XXX., Part III., *Magistrate's Cases*, p. 46). That was a case in which a *Habeas corpus* had been issued at the instance of the father, calling upon one John Howes to shew cause why he should not deliver up the body of a girl under 16 years of age. The Chief Justice there says: "In the course of the judgment in the *Matter of Alicia Race*, reference is made to a letter of Sir Erskine Perry, late Chief Justice of Bombay, shewing that, in the opinion of Patteson, J., a father was entitled to the custody of his child even after the age of 14 years. Can it be said that this girl has arrived at the age of discretion to decide whether she will stay away from her father or not, when her consent would not prevent any one who took her away from being punished for so doing?" Again—"Now the cases which have been decided on the subject shew that, although a father is entitled to have the custody of his children after their attaining the age of 21 years, the Courts of Law will not interfere by *Habeas corpus* to withdraw a child from the custody of persons with whom it may be, and hand it over to the custody of its father, if it has attained the age of discretion, and is capable of understanding the position in which it is placed. The whole question is: At what age can a child be said to arrive at the age of discretion? We wish it to be understood that we wholly repudiate the notion that mental precocity can entitle a female child to withdraw herself from the custody of her father; for that very precocity may be the very reason for its being undesirable that she should do so: it might very likely lead a young girl into difficulty and danger. We are bound to see that we act upon some general rule as to the age at which a person, although a minor, may be left to the freedom of choice which the law recognises. The Legislature has thrown light upon the subject which may safely guide us: the age of 16 years is pointed out as the age up to which a child ought to remain under parental control, for it has been held that even the consent of a female child who has been taken away from her father is not sufficient to justify those who so take her away. We may rely for guidance on the light thus thrown on the subject, and the age of 16 years may be declared to be the age at which a young female cannot be said to have such a discretion as to be entitled to withdraw herself from the custody of her father, where there is nothing to shew that he will not exercise a proper parental control. The girl must therefore be delivered over to her father." * * * "I wish to say that we have not arrived at this conclusion without great consideration, nor without consulting with the Judges of the other Courts, who entirely agree with us in our opinion."

ORDINARY ORIGINAL CIVIL JURISDICTION.

(BHOOBUN MOHUN DEY vs. DENONATH DEY AND OTHERS.)

Where an ill-conditioned person files a plaint for partition, solely for the purpose of inflicting injury upon his joint-holders, the Court will, in the exercise of the power conferred by section 187, Act VIII., mulct him in the entire costs.

This was a suit for partition of an outlying house and a piece of land valued at 10,000 rupees. The main point of interest was the question as to who should pay the costs of the defendant.

Mr. Eglinton for plaintiff.

Mr. Bell for Denonath Dey.

Mr. Justice Wells said that he was exceedingly glad to have an opportunity of stating his views upon the subject of costs in partition suits. He was satisfied that in many cases under Act VIII. actions of this kind had been brought solely for costs. In many instances the whole family had been ruined from the fact of one member of it being an ill-conditioned man. He did not feel himself bound here by English precedents. He was sitting and adjudicating under Act VIII. He had had several partition-suits before him where the entire property at stake was not worth more than 800 rupees. The property in many cases consisted of a dwelling-house, often the only residence of a Hindoo family; and he could not conceive anything much harder than that one individual member of a family should bring a suit for the partition of such a property. It often happened that the house was sold for the purpose of paying the costs incurred, and the result was that six or seven families were turned out without a place to go to. If he had been satisfied that the present was an application of that nature by an ill-conditioned man, and that the property was of the kind above mentioned, he would certainly have made the plaintiff pay not only his own costs, but all the costs incurred up to actual partition. Sec. 187, Act VIII., 1859, was in the following words: "The judgment shall direct, in all cases, by whom the costs of each party are to be paid, whether by himself or by another party, and whether in whole or in what part or proportion, and the Court shall have full power to award and apportion costs in any manner it may deem proper." This section gave him the very fullest discretionary power, and it was a power which, under the circumstances named, he should most certainly exercise. In the present case he saw no reason why the defendant should not pay his own costs.

Decree accordingly.

APPELLATE JURISDICTION.

[BEFORE THE CHIEF JUSTICE AND MR. JUSTICE LEVINGE.]

PALMER AND OTHERS VS. COHN AND ANOTHER.

The decision of a Court of Original Jurisdiction upon a question of fact ought not to be reversed by a Court of Appeal, unless that Court is satisfied, beyond all reasonable doubt, that the decision was wrong.

When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

If a party enters into a contract to provide and ship molasses at the risk and expense of the seller, he must be taken to guarantee that the casks are proper casks, and properly coopered for any voyage from Calcutta, for which such goods may be reasonably ordered by the plaintiffs to be shipped.

The Advocate-General and Mr. Woodroffe for the appellants.

Mr. Bell and Mr. Eglinton for the respondents.

This was an appeal from a decision of Mr. Justice Morgan. The action was originally brought to recover the sum of 2,715 rupees, the amount of damages sustained by the plaintiffs in consequence of breach of contract on the part of the defendants. It appeared from the evidence adduced that the plaintiff, a partner in the firm of Mackillop, Stewart and Co., being desirous of sending a consignment of 100 hogsheads of treacle to Melbourne, applied to Messrs. Cohn, Feilman and Co., who undertook to ship the quantity required at 1-2 per maund, supplying casks at 5-8 each. The plaintiffs took delivery, and paid the amount due upon the goods, viz., Rs. 1,553. On the arrival of the vessel at Melbourne, it was found that 81 out of the 100 hogsheads had either burst, or leaked so much that the treacle was wholly lost. The plaintiffs alleged that the bursting and leaking arose from the defective condition of the casks at the time of shipment.

Mr. Justice Morgan considered that they had made out their case, and gave a verdict for the full amount claimed. Against this decree the defendants

appealed. The case was argued on the 21st of May, and their Lordships then gave it as their opinion that it was not open to the appellants to disturb the prior judgment upon a question as to the credibility of witnesses. The point as to whether the plaintiffs were or were not entitled to damages at all must therefore be set aside. The only case in which they could enter upon that point was, "where it was manifestly clear, from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusion drawn from such evidence." This was decided in the case (*Musadee Mahomed Kazum Sherazee v. Meerza Ally Mahomed Shoostree and Bibee Marium Begum*) 8 Moore's Privy Council Reports, where it was also held that "As, by the constitution of the Supreme Courts in India, the Judges, for the purposes of the trial of an action, sit as a Jury as well as Judges, the same weight is to be given to their decision, under such circumstances, as to the verdict of a jury in this country (*i.e.*, England) in which the Judge who tries the cause makes no objection." The only point, therefore, which the Court had to consider was the amount of damages to be assessed. In this point of view the case was very important, and the principles involved of great value. The Court would take time to deliberate.

On the 3rd of July the Court delivered the following judgment :

The Chief Justice.—This was an action for the breach of an agreement by which the defendants contracted to sell to the plaintiffs 100 hogsheads of molasses at Rs. 1-2 per bazar maund.

It was stipulated by the contract, as proved by the bought and sold notes, that the sellers were to provide casks at Rs. 5-8 each, which price was to include coopering, marking, &c., and that the whole was to be shipped in three days at the risk and expense of the sellers.

The declaration alleged that the plaintiffs were desirous of sending a consignment of 100 hogsheads of molasses from Calcutta to Melbourne in Australia, and thereupon, to wit, on the 20th day of June in the year of our Lord 1861, in consideration that the said plaintiffs, at the request of the said defendants, would buy of the said defendants one hundred hogsheads of molasses, actual weight and tare, at the rate or price of Rs. 1-2 per bazar maund, and would pay for casks to hold the said molasses for shipment, which said casks were to be provided by the said defendants at the rate of Rs. 5 8 each, which last-mentioned price was to include cooperage, marking, &c., and would

take delivery of the said goods, and would pay cash on delivery; the said defendants promised to provide reasonably fit and proper casks, fitly and properly coopered, wherein to ship the said molasses, at and for the said price of Rs. 5-8 each, and to ship the whole of the said goods in three days at the risk and expense of the said defendants. The said plaintiffs aver that although they, confiding in the said promise of the said defendants, did afterwards, to wit, on the day and year aforesaid, buy of the said defendants the 100 hogsheads of molasses at the prices and upon the terms in that behalf aforesaid; and although the said defendants did provide divers, to wit, 100 casks, wherein to ship the said molasses at the price per cask on that behalf as aforesaid, and for the said reasonably fit and proper casks, fitly and properly coopered, on that behalf aforesaid; and although the said defendants did, within three days, ship the whole of the said goods, being in the said last-mentioned casks, at the risk and expense of the said defendants, in and upon a certain vessel named the *Littlefield*, then lying in the port of Calcutta, and about to proceed to Melbourne aforesaid; and although the said plaintiffs took delivery of the said goods, and paid the defendants for the said molasses and the said casks, at and after the rate and upon the terms, and at the time in that behalf aforesaid, and did all other things on their part to be done and performed in the premises; yet the said defendants, not regarding their said promise in that behalf, did not, nor would, provide reasonably fit and proper casks, fitly and properly coopered, wherein to ship the molasses; but, on the contrary thereof, the said casks so provided by the said defendants, wherein to ship the said molasses as aforesaid, were casks wholly unfit and improper to receive or hold the said molasses for shipment, and were also wholly unfitly and improperly coopered in that behalf: whereby, thereupon, and after, the said molasses leaked and escaped from and out of the said casks, and a large portion thereof, to wit, eighty-one hogsheads, became, and was, and is, wholly lost to the plaintiffs, and thereby the plaintiffs not only lost the same, but also all the benefit, profit, and advantage which otherwise they might and would have acquired from the sale of the said molasses lost as aforesaid; and the said plaintiffs have also been put to great expense, in and about the shipping and conveying of the said molasses, lost as aforesaid, to Melbourne, and in and about other expenses relating to the same.

The defendants pleaded: 1st. That they did not promise. 2nd. That they provided reasonably fit and proper casks, fitly and properly coopered, wherein to ship the said molasses.

The case was tried before Mr. Justice Morgan, who was of opinion upon

the evidence that the loss of the molasses or treacle was proved to have been caused by the neglect of the defendants and their servants, due care not having been taken by them in the preparation of the casks in which it was put, and he gave judgment for the plaintiffs—damages Rs. 2,715. From this judgment the plaintiffs have appealed upon the following grounds :

1st. For that the verdict of the Court in favour of the defendants was not founded upon sufficient evidence, and was against the weight of evidence such as it was, and the Court ought to have found a verdict for the defendants.

2nd. For that no contract was proved, either expressly or by implication, from the payment of an extra price for the casks, or otherwise to deliver molasses in casks fit with reference to a voyage to Australia, or any other voyage, but merely ordinary good casks at the market-rate ; and the evidence showed that ordinary good casks were supplied.

3rd. For that there was evidence that molasses is an article of commerce known to be extremely liable to fermentation when filled into the best casks and with the greatest care ; and there was evidence of an improper stowing of rice cargo, on board the ship, over the surface of the upper tier of casks ; and there was no contract proved to the effect that the defendants were to be insurers of the goods and casks after they were delivered on board.

4th. For that the plaintiffs in any case are not entitled to Rs. 2,715, the damages claimed by them ; but only to recover back the purchase-money of the molasses and casks paid, plus the equivalent of the surplus to debit of the consignment, which was stated to be £6-9-11.

The contract having stipulated that the molasses was to be shipped at the risks and expenses of the sellers, the reasonable intendment was, that it was to be shipped for the purpose of being carried on a voyage. The defendants therefore, when they contracted by that agreement to provide casks at Rs. 5 8 each, which price was to include coopering and marking, guaranteed that the casks to be provided should be proper casks ; and that the casks should be properly coopered for any voyage from Calcutta, for which such goods should be reasonably ordered by the plaintiffs to be shipped. *Jones vs. Bright* (5 Bingh 538). A voyage to Melbourne was doubtless a reasonable voyage.

We are of opinion that the learned Judge came to a right conclusion upon the evidence, and think that the loss of the molasses was caused by its having been shipped in casks which, if reasonably proper for the voyage, were not properly coopered for the purpose.

We intimated our opinion upon this point during the argument, and, having fully considered the evidence, we see no reason to change that opinion.

The decision of a Court of Original Jurisdiction upon a question of fact ought not to be reversed by a Court of Appeal, unless that Court is satisfied, beyond all reasonable doubt, that the decision was wrong.

In this case, so far from thinking that the learned Judge was wrong, we draw the same conclusion as he did from the evidence. We, therefore, affirm the decision of the lower Court, so far as the 1st, 2nd, and 3rd grounds of appeal are concerned. The only remaining point is the question of damages, which is the subject of the 4th ground of appeal.

It appears that out of 100 hogsheads shipped a quantity equal to the contents of about 80 or 81 hogsheads was lost on the voyage in consequence of the insufficiency of the casks, or the cooperage.

The quantity which arrived was sold at the market-price of the day, the nett proceeds of which amounted to £90-7-3. The charges of the plaintiffs' Agents at Melbourne, including freight which was paid by them, amounted altogether to £96-17-2.

The charges therefore exceeded the proceeds by the sum of £6-9-11. It is contended on the part of the defendants, that the plaintiffs are not entitled to recover the damages awarded to them, but only to recover back the purchase-money paid for the goods, plus the equivalent of the surplus to debit of consignment, amounting to £6-9-1.

We think that they are entitled to recover the amount which they would have received, if the casks had been sufficiently and properly coopered, and the molasses had arrived at the port of destination. In calculating the damages, 5 per cent., which, according to the evidence, we think a reasonable sum to be allowed for ordinary loss of weight on the voyage, has been deducted, in order to arrive at the amount which plaintiffs would have received if the hogsheads were in a proper state. Several cases were cited in the course of the argument on the subject of damages, but when the contract which the defendants entered into is ascertained, we think there can be no difficulty in applying the principle upon which damages ought to be assessed in the present case. The rule appears to be correctly laid down in *Hadley vs. Baxendal* (9 Exchequer Reports). In that case Mr. Baron Alderson in delivering his judgment says (page 354): "Now, we think that the proper rule in such a case is this: 'Where two parties have made a contract which one of them has

'broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may, fairly and reasonably, be considered either arising naturally, *i. e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.' "

In this case we have already expressed our opinion that the defendants warranted that the casks which were to be supplied should be sufficiently and properly coopered for any reasonable voyage from Calcutta. The defendants contracted that the goods were to be shipped in three days at the expense of the sellers. But it was for the plaintiffs to point out the ship, and to determine for what port the goods were to be shipped. The damages must be assessed upon the same principle as they would have been if the defendants had warranted that the hogsheads should be sufficiently and properly coopered for a voyage to Melbourne, the maxim of law being "*Id certum est quod certum reddi potest.*"

The plaintiffs, confiding in the defendants' warranty, and not knowing the defects of the casks or cooperage, ordered the goods to be shipped for Melbourne, became liable for freight, and despatched the goods upon the voyage. In consequence of the defendants' breach of contract, 80 or 81 hogsheads were lost upon the voyage from the defect of the casks. If the defendants had performed the contract, those 80 or 81 hogsheads would have arrived at the port of destination, minus any such quantity as would have been lost by ordinary leakage or evaporation, for which an allowance of 5 per cent. has been made; and the plaintiffs would have sold the molasses for the market-value at that port. By so doing, if they had sold for the same price as they sold that which did arrive, they would have cleared £265-1, after paying all expenses including freights, instead of having to pay the £6-9-1 to the debit of the consignment. Their loss, if the account is correct, therefore, is the equivalent of those two sums, or Rs. 2,715, the sum awarded. The loss of the market-price at Melbourne of the 80 or 81 hogsheads arose naturally or according to the definition of that word by Mr. Baron Alderson "according to the usual course of things from the breach of contract itself." The damages were not caused by any collateral circumstances unconnected with the contract. If the defendants had contracted to deliver 100 hogsheads of molasses to the plaintiffs at Melbourne, and had neglected to deliver them, the plaintiffs would have been

entitled to recover damages estimated according to the market-price of such goods at Melbourne at the time at which they ought to have been delivered, and not merely what the plaintiffs paid for the goods in Calcutta as the consideration for the defendants' contract.

Where is the difference in principle between the breach of such a contract and the breach of a warranty that the molasses should be shipped in hogsheads properly coopered to enable the plaintiffs to convey it to Melbourne? In each case the non-receipt of the market-price at Melbourne, after deducting all charges of sale, &c., would be the natural result of the breach of contract; and, consequently, the loss of the amount would be legally recoverable as damages for the breach of contract.

The defendants, by admitting in their 4th ground of appeal, the plaintiffs' right to recover the equivalent of £6-9-1, the surplus to debit of consignment, in addition to the purchase-money paid, admit that the plaintiffs are entitled to recover the £81-5 paid for the freight of the molasses from Calcutta to Melbourne; for the £81-5 forms one of the items of Fanning, Rankwell & Co.'s charges of £96-17-2, from which the £90-7-3, the nett proceeds of that part of the molasses which did arrive, was deducted. Now, upon what principle can it be contended that the loss of the freight paid for the goods to Melbourne, or, in other words, the expenses of sending the goods there, are to be borne by the defendants as the natural result of their breach of contract? And yet that the price which the plaintiffs would have received for the goods at Melbourne, if they had arrived there, minus the Custom duty, charges of sale, &c. (which they would have had to pay before they could obtain that price), did not also, naturally, result from the breach of contract. In fact, the plaintiffs must have paid the freight whether the goods arrived or not: they did not lose that amount by the non-arrival of the goods. What they did lose was, the amount of the clear proceeds which they would have received if the goods had arrived and been sold there.

It was not contended that the account does not properly show the amount of the plaintiffs' damage, if they are entitled to recover as damages the sum which they would have realized at Melbourne, if no part of the cargo had been lost in consequence of the defects in the casks.

We have examined that account, and it appears to us that it is made out upon a correct principle. It appeared at first sight, the freight was improperly deducted in arriving at the amount of clear proceeds which would have been

realized. But the effect of that deduction is neutralized in the account by crediting the plaintiff; with the £6-9-4 surplus charges to debit of the consignment, the effect of which was to re-credit the plaintiffs for the freight which was paid by Messrs. Fanning & Co., and included in their charges of £90-7-3. It was urged, but the point was not much pressed, that if the 80 hogsheads had arrived, and been sold as well as the 20, the same price would not have been obtained; but we cannot suppose, in the absence of all evidence, that an addition of 80 hogsheads to the quantity sold would, in a place like Melbourne, have had any material effect in lowering the market-price of such a commodity as molasses.

We think, therefore, that Rs. 2,715 is a proper amount of damages, and that the decree must be affirmed. The appeal is dismissed with costs, and interest thereon at 6 per cent. from the completion of taxation, until the same shall be realized.

Decree accordingly.

ORDINARY ORIGINAL CIVIL JURISDICTION.

COHEN AND ANOTHER *vs.* AUCTION CO., LIMITED.

Jewels given to a married woman during coverture by a relative or a stranger—Held property belonging to the separate use of the wife—Held; further, that the subsequent investment of the same in the purchase of real estate conveyed to the wife does not cause a change in the nature of such property.

Mr. Newmarch for the plaintiffs.

Mr. Paul and *Mr. Lowe* for the defendants.

The Auction Company, Limited, having obtained a judgment for Rs. 3,700 against one Cohen, seized a house in Calcutta, on the ground that the house was the property of their judgment-debtor. Cohen and another, as the executors and trustees under the will of Mrs. Cohen, the wife of the judgment-debtor, claimed the house and premises mentioned above as the property of Mrs. Cohen, deceased. Their claim now comes on for adjudication.

By the petition of the claimants, supported by affidavit, it appeared that the house in question had been purchased by the wife of the judgment-debtor, who was a Jewish lady, out of the proceeds of the sale of jewellery given to her by her relatives on the occasion of her marriage; that the conveyance from the

vendor was an absolute conveyance in fee to her, her heirs and assigns, and that she had made a will, devising the house to the claimants, Cohen and another, as executors and trustees, to hold the same upon trust for her children. It also appeared that Cohen, the judgment-debtor, who was a Jewish merchant, had been a trader at the time of the execution of the conveyance to his wife.

Mr. Newmarch, for the claimants, contended that the jewels given to Mrs. Cohen at her marriage should be considered as property given to her separate use; that their proceeds, when invested, retained the character of property which exclusively belonged to her; and that the real estate so purchased was not liable for the debts of her husband. He cited *Graham vs. Lord Londonderry* (3 Atkyns, p. 392), *Glaister vs. Hewer* (8 Vesey, p. 195), and *Bridges vs. Kingdon* (2 Vernon, p. 67) in support of his argument. He also referred to *Mr. Roper's* remarks on the same subject.

Mr. Paul for the Auction Co., Limited, contended that all personal property coming to the wife at, or subsequently to, her marriage, not expressly settled to her separate use, belonged to the husband. That the doctrine of property, considered as appropriated to the separate use of the wife, was the creature of a Court of Equity, which could be only enforced when trustees had been appointed to hold property to the separate use of the wife, or when the husband had so divested himself of its ownership as to make himself a trustee for the wife. He contended further that the case of *Graham vs. Londonderry* in 3 Atkyns, p. 392, could be considered no authority, as that case was loosely decided and contained observations irreconcilable and inconsistent with each other, and that, even assuming that the jewels were to be considered as separate property, from the fact of their being so intended by the donors from the expected use of them; yet as soon as they were converted into money, they lost their characteristic property of belonging to the separate use of the wife. He argued that a husband could not make a valid gift to the wife, citing *Bell on Husband and Wife*, page 470, and that the case of *Glaister vs. Hewer* was distinguishable on the ground of the provision for the wife being in the nature of a *donatio mortis causa*, and being copyhold estate, which copyhold estate vested in the wife by the joint operation of the surrender by the husband to the Lord of the Manor, and the subsequent admission of the wife as tenant in the rolls of the Lord of the Manor. Further, assuming that the property in question was to be considered as property belonging to her separate use, it was contended that the wife could not make a will of real estate without express power for

that purpose (*Churchill vs. Dibben*, 2 Kenyon's Reports, Part II., p. 68), and that the husband was, at all events, entitled to a life-interest as tenant by curtesy.

His Lordship was of opinion, on the authority of *Graham vs. Lord Londonderry*, that the jewels ought to be considered as property devoted to the separate use of Mrs. Cohen. That the subsequent sale of the jewels, by their conversion into money, was not sufficient to cause a change in the characteristic of separate property, and that, therefore, the investment of the proceeds of the jewels in land ought to be regarded as property appropriated to Mrs. Cohen's separate use. Mrs. Cohen had no power to make a will disposing of the house; consequently, Mr. Cohen, the judgment-debtor, had a life-interest in that house seizable by the judgment-creditor. Each party should pay his own costs, as each had claimed more than was awarded by the Court.

Decree accordingly.

BUDDOO BABOO *vs.* LAMBODAR MULLICK.

A Mofussil Judge stated in his Return to the Sheriff of Calcutta that substituted service had been effected by fixing a copy of the summons to the "house" of the defendant. Held that the Return was insufficient, and that the word "dwelling-house" must be expressly mentioned.

Mr. Paul for the plaintiff.

The defendant did not appear.

In this case the summons had been sent up to the Judge of Beerbhoom with instructions to serve it upon the defendant, who was resident in his district. The Judge sent the following reply:—

No. 124.

From O. W. Malet, Esq., Judge of Beerbhoom,
To the Sheriff of Calcutta.

Civil Court.

Dated Soorie, 15th June 1863.

SIR,—In reply to your letter No. 130, dated the 8th instant, I have the honour to return you the original summons therein enclosed, with the vernacular papers reporting the manner of its service. Unable to find the defendant, his authorised agent, or any adult member of his family living with him, the

peon deputed for the service of the process affixed the duplicate summons to the gate of the public entrance to the defendant's house.

I have the honor to be,

Sir,

Your most obedient servant,

D. O. W. MALET, Judge.

Mr. Justice Wells said that the service of the summons, as stated in the Judge's letter, was altogether insufficient. It was not enough that the copy of the summons be affixed to the "*house*." The "*house*" must be the "*dwelling-house*." The Act expressly laid down in section 55 that "where the defendant cannot be found, and there is no agent empowered to accept the service, nor any other person on whom the service can be made, the serving officer shall fix the copy of the summons on the outer door of the house in which the "*defendant is dwelling*." The object of substituted service is to bring the summons to the defendant's notice in the most feasible way. To fix a copy of a summons to a person's house is no notice at all; for a man may have, and often does have, a great number of houses; but when a copy is fixed to the door of a man's "*dwelling-house*," the law presumes that he will see it, or at least have it brought to his notice. Perhaps, however, the vernacular papers mentioned in the letter might throw some light upon the matter. They had better be translated.

The Interpreter of the Court, Samachurn, translated the papers, but the statement there was little more than that contained in the letter. The word used was "*bati*," which, Samachurn said, corresponded exactly in meaning with the word "*house*."

Mr. Paul remarked that he was instructed that the summons had been served upon the defendant in person.

Mr. Justice Wells said it might be so, but the statement was directly opposed to the assertion of the Judge.

Mr. Paul suggested that, under those circumstances, it would be necessary to make another application to the Judge.

Mr. Justice Wells said that the case must stand over for three weeks, in order that the Judge might certify whether the copy of the summons was or was not fixed to the door of the defendant's *dwelling-house*. The man, for anything to the contrary, before the Court, might have any number of *houses*.

The Court was constantly put to the greatest inconvenience by being compelled to postpone cases in consequence of carelessness of this nature on the part of Mofussil Judges.

**MADAROD DOWLAH NAWAB SYED ALLY NUCKEE KHAN
BAHADOOR vs. WILLIAM ANLEY.**

If a client places himself in the hands of an attorney, he places himself in his hands in regard to all matters having connection with the suit, and the attorney must be held liable for any negligence, even though his client do not take prompt action in the matter.

Mr. Bell and Mr. Reed for the plaintiff.

Mr. Paul for the defendant.

The plaintiff in this case was the celebrated Ally Nuckee Khan, formerly Prime Minister of the King of Oude. The defendant was Mr. William Anley, one of the attorneys of the High Court. The circumstances were as follows. It appears that one Womeschunder Roy, wishing to borrow Rs. 32,000, applied to Mr. Anley, who introduced him to the plaintiff, who consented to lend the sum required on the understanding that the defendant would have the money secured to him by a bond and judgment-warrant. The bond was executed, but Mr. Anley neglected to have it stamped, and the consequence was that the plaintiff could not prosecute his claim against Womeschunder Roy without paying the penalty for neglecting to affix a stamp. This penalty he had paid, amounting to Rs. 2,100, and now sued the defendant, William Anley, to recover that amount.

Mr. Bell, on behalf of the plaintiff, contended that his client was entitled to the full amount claimed.

Mr. Paul said that he should not for a moment contend that the plaintiff was not entitled to recover anything. There had been negligence on the part of his client in not getting the document stamped. He should confine his attention to the amount of damages. The plaintiff had, no doubt, been compelled to pay the sum of Rs. 2,100 before he could bring the action against Womeschunder Roy. It did not, however, follow that the plaintiff was therefore entitled to receive the whole amount. According to the evidence, the plaintiff's attention was drawn to the fact of the bond not being stamped before the expiration of 6 months from its execution; and if the plaintiff had then had the

bond stamped, he would have had much less to pay. The whole question depended upon the time at which the breach of duty took place. Was the plaintiff compelled to pay the Rs. 2,100 solely on account of defendant's negligence, or on account of his own negligence and that of the defendant combined. If his Lordship thought the latter, Rs. 400 was the utmost that could be claimed.

Mr. Justice Wells.—The plaint in this case alleges that the defendant was employed by the plaintiff as his attorney for the purpose of drawing a bond, and that it was the duty of the defendant to have the bond properly stamped, but that the defendant neglected so to do, whereby the plaintiff was compelled to pay the sum of Rs. 2,100 for the purpose of stamping the bond, in order to be able to bring an action against Womeschunder Roy. A representation was made to the plaintiff in this action that if he would make the advance, Womeschunder Roy would give a bond. Mr. Anley was then acting, and continued to act, on behalf of the plaintiff, although he was also acting for Womeschunder Roy. The parties were satisfied, and it was proposed that Mr. Anley should prepare a bond. On 1st October 1860, Act XXXVI. came into operation, and Mr. Anley, as an attorney of this Court, ought to have been acquainted with its contents long before. If necessary, I should fix Mr. Anley with knowledge of this Act, even prior to its coming into force, because it is especially necessary that attorneys should be well acquainted with the Stamp laws. Now it has been allowed on all sides that Mr. Anley did not stamp the bond. Mr. Anley says that the reason of this was "that it was done in a great hurry." I cannot understand what Mr. Anley means by this. Upon Mr. Anley's own evidence there is the clearest admission of gross negligence on his part. Now, Mr. Anley, acting as attorney for the plaintiff, kept the bond in his possession, and Mr. Moseley, the plaintiff's agent, went to Mr. Anley respecting the bond; but it does not appear that he came to the knowledge that the bond was not stamped till 4 months after its execution.

Mr. Anley either did not intend to have the bond stamped at all, or was unaware as to whether it had been stamped or not. Mr. Moseley told the plaintiff that the bond had not been stamped, and, as soon as the communication had been made, by the instructions of the plaintiff went to Mr. Anley and spoke to him respecting the matter. Mr. Anley did not say, as he might have done, "I will give you the bond, and the best thing will be for you to get it stamped and pay the penalty." He seems not to have taken the slightest notice of the matter. My opinion is that Mr. Anley never intended to have that bond stamped. Mr. Moseley went again and again, but was unable to obtain any satisfaction. Now, Mr. Paul

says that the circumstance of the bond not having been stamped came to the knowledge of the plaintiff 4 months after execution, and that the plaintiff is not entitled to recover more than he would have had to pay if he had had it stamped at that time. But Mr. Anley took upon himself to get the document stamped, and, therefore, these arguments do not apply. If a client places himself in the hands of an attorney, he places himself in his hands in regard to all matters having connection with the suit, and the attorney must be held liable for any negligence, even though the client do not take prompt action in the matter. If the case fell far short of the facts in the present instance, I should feel it my duty to decide against Mr. Anley. As regards the alleged negligence, the present action is quite undefended. I am of opinion that the negligence in this case is clear and palpable, and I unhesitatingly give a decree for the full amount claimed, with costs and 6 per cent. interest from the date of the filing of the plaint.

Decree accordingly, Costs No. 2.

SAGORE DUTT vs. RAMCHUNDER MITTER.

The High Court, in the exercise of its Civil Jurisdiction, has not the power to execute its own decree or serve its own process out of the local limits of such jurisdiction.

The only enactment in relation to Civil Procedure now in force, besides Act VIII. of 1859 and the Acts modifying such Acts, are Act XVII. of 1852 and a part of Act VI. of 1854.

A claim to property under section 246 of Act VIII. of 1859 is virtually a suit for land.

*Mr. Justice Wells:—*This is an application for the arrest and imprisonment of the defendants, who are residing in the 24-Pergunnahs, in execution of a decree of this Court.

The late Supreme Court possessed no Appellate Jurisdiction, but a general as well as a Local Original Jurisdiction, embracing matters civil as well as criminal. It executed its own writs and processes throughout the provinces and districts annexed to and made subject to the Presidency of Fort William, such provinces and districts being within the limits of its general jurisdiction.

The jurisdiction of the High Court is in some respects analogous to that of the Supreme Court, but is in other respects wholly dissimilar. It has an Appellate Jurisdiction as extensive as that possessed by the late Sudder Court,

but which it never exercises for the purpose of enforcing its decrees or orders, the same being enforced through the subordinate Courts; and it has an extraordinary Original Civil Jurisdiction as also an Extraordinary Original Criminal Jurisdiction peculiar to itself. It has besides a Civil Jurisdiction, a Criminal Jurisdiction, an Admiralty and Vice-Admiralty Jurisdiction, a Testamentary and Intestate Jurisdiction, and a Matrimonial Jurisdiction. Sections 11 and 12, of the Letters Patent constituting the High Court relate to its Original Civil Jurisdiction; section 13, to its Extraordinary Original Civil Jurisdiction; sections 21 and 22, to its Ordinary Original Criminal Jurisdiction; section 23, to its Extraordinary Original Criminal Jurisdiction; sections 31 and 32, to its Admiralty and Vice-Admiralty Jurisdiction; sections 33 and 34, to its Testamentary and Intestate Jurisdiction; section 35, to its Matrimonial Jurisdiction; and sections 24, 15, and 16, to its Appellate Jurisdiction. Its Ordinary Civil Jurisdiction, unlike the jurisdiction of the Supreme Court, is merely local, as is also its Matrimonial Jurisdiction. Its Extraordinary Original Civil Jurisdiction is to try and determine any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when it shall think proper to do so either on the agreement of the parties to that effect or for the purposes of justice. Its Ordinary Original Criminal Jurisdiction is both local and general, and is in all respects the same as that exercised by the Supreme Court on its Crown side. Its Extraordinary Original Criminal Jurisdiction is over all persons residing in places within the jurisdiction of any Court formerly subject to the superintendence of the Sudder Nizamut Adawlut at Calcutta, whether within or without the Bengal Division of the Presidency of Fort William; and in the exercise of this jurisdiction it has authority to try, at its discretion, any such persons brought before it on charges preferred by the Advocate General or by any Magistrate or other officer specially appointed by the Government in that behalf. Its Admiralty and Vice-Admiralty Jurisdiction is the same as that exercised by the Supreme Court on its Admiralty side and by the late Vice-Admiralty Court. Its Testamentary and Intestate Jurisdiction is the same as that exercised by the Supreme Court on its Ecclesiastical side.

As the present question arises with reference to the Original Civil Jurisdiction of the Court, it is necessary to enquire more particularly as to the nature and extent of such jurisdiction.

Section 11 of the Letters Patent provides "that the High Court of Judicature at Fort William in Bengal shall have and exercise Ordinary Original Civil Jurisdiction within such local limits as may, from time to time, be de-

clared and prescribed by any law or regulation made by the Governor-General in Council, and, until some local limits shall be so declared and prescribed, within the limits declared and prescribed by the Proclamation fixing the limits of Calcutta, issued by the Governor-General in Council on the tenth day of September 1794, the Ordinary Original Civil Jurisdiction of the said High Court *shall not extend* beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction." As no law or regulation has been made by the Governor-General in Council, declaring and prescribing local limits within which the Ordinary Original Civil Jurisdiction of the Court is to be exercised, the limits of the Town of Calcutta are the present limits within which jurisdiction is to be exercised.

Section 37 of the Letters Patent provides that, except in matters testamentary and intestate, and matrimonial, the proceedings in civil cases of every description between party and party shall be regulated by the Code of Civil Procedure prescribed by Act VIII. of 1859 or such further or other enactments of the Governor-General in Council in relation to civil procedure as are now in force.

The only enactments in relation of civil procedure now in force, besides Act VIII. of 1859 and the Acts modifying such last-mentioned, are Act XVII. of 1852 and a part of Act VI. of 1854; but neither of these Acts gives this Court other or larger powers with reference to enforcing its judgments or decrees than those conferred by the Letters Patent, and intended to be exercised under Act VIII. of 1859.

By sections 284—295 of Act VIII. of 1859 provision is made for the execution of a decree of one Court within the jurisdiction of another Court; and the words "*may be executed*" in section 284 and the words "*may apply*" in section 285 seem to indicate that it was left optional with the suitor either to proceed under these sections or in some other mode. And when Act VIII. of 1859 was passed it was open to the suitor to proceed to execution either under the provisions of that Act or of Act XXIII. of 1840, which provides for executing within the local limits of the jurisdiction of Her Majesty's Courts legal process issued by the authorities in the Mofussil, or of Act XXXIII. of 1852, which provides the means of obtaining satisfaction of a judgment of any Mofussil Court of which satisfaction cannot be obtained within its jurisdiction, or of Act XXXIV. of 1855, which is to be read with, and taken as part of, the last-mentioned Act. But by Act X. of 1861, Act XXXIII. of 1862, as well as Act XXXIV. of 1855, were repealed; the former except so far as it relates to the enforcement of judgments by any Courts established by Royal Charter, and

except so far as it relates to the enforcements of decrees of Military Courts of Request; and the latter, except so far as it relates to the enforcement of judgments by any Court established by Royal Charter; and they were both, as far as they relate to the enforcement of judgments by any Mofussil Court, repealed in consequence of Act VIII. of 1859 having provided a complete mode of enforcing the judgments of one Mofussil Court within the jurisdiction of another Mofussil Court. It is difficult to understand why these Acts were not also repealed so far as they relate to the enforcement of judgments by the Courts established by Royal Charter; but it is not improbable that when Act X. of 1861 was passed, it was overlooked that Act VIII. of 1859, although not then the procedure of the Courts established by Royal Charter, was by one of its own sections (382) extended and made applicable to such Courts, as far as regards the provisions as to the execution of the decrees of Mofussil Courts. And the same observation would apply to Act XXIII. of 1840, so far as it relates to the execution of decrees, though not so far as it relates to the service of process, as no provision, other than that contained in such last-mentioned Act, existed at the time for the service of Mofussil process within the local limits of Her Majesty's Courts. These Acts, however, while they provide for the execution or service of Mofussil decrees or process within the jurisdiction of these Courts, do not provide for the execution or service of the decrees or process of this Court within the jurisdiction of other Courts; and, therefore, this Court is, as regards the present question, as much tied down to the provisions of Act VIII. of 1859 as are the Mofussil Courts with respect to each other. And as Act VIII. of 1859 provides but one mode for executing the decrees of one Court within the jurisdiction of another Court, it appears to me that that is the only mode to which, in the present state of the law, recourse can be had. To hold otherwise would be to disregard the whole spirit and intention of Act VIII. of 1859, which throughout proceeds upon the assumption that every Court has a jurisdiction within certain limits separate and distinct from every other Court; and its provisions are applicable only to Courts possessing such a jurisdiction. And, no doubt, it was with a view to make it applicable to this Court in its Ordinary Original Civil Jurisdiction that such jurisdiction was restricted to the local limits of the Town of Calcutta. No such restriction exists either as to the Criminal, Admiralty and Vice-Admiralty, or Testamentary and Intestate Jurisdiction of the Court, because it was not necessary that these jurisdictions should be restricted, as Act VIII. of 1859 was not intended to apply to any of them. It is true the Matrimonial Jurisdiction of the Court, to which Act VIII. of 1859 is not applicable, is also restricted to the same limits within which the

Civil Jurisdiction of the Court is to be exercised ; but this jurisdiction is in some respects new, and no procedure applicable to it has yet been prescribed.

If the Court, in the exercise of its Original Civil Jurisdiction, were to assume the power of executing its own decrees out of the local limits of such jurisdiction, it would not only be interfering with the jurisdiction of other Courts, but would, in some instances, be unable to attain its object, or carry out certain provisions of Act VIII. of 1859, as to the execution of decrees. Thus, for instance, if it seized immoveable property situate within the jurisdiction of another Court, without the intervention of such Court, how would it cause delivery to be made under sections 263 and 264 of the Act? Or if a claim to such property were preferred under section 246, how would it proceed in order to investigate such claim? It is to be observed that a claim under this section frequently involves important questions of title, and is virtually an ejectment-suit and a suit for land ; and this Court is only empowered, under section 12 of the Letters Patent, to try and determine suits for land or other immoveable property, if such land or property is situate within the local limits of the Ordinary Original Civil Jurisdiction of the Court.

It may be inconvenient that the Court, in the exercise of its Ordinary Original Civil Jurisdiction, should not be able in particular instances to execute its own decrees, or serve its own processes out of its local jurisdiction, as, for instance, the 24-Pergunnahs ; but against this may be set the great advantage, both as regards time and expense, of being able to have processes served, as well as decrees executed, in distant districts through the local Courts ; and if the advantages were looked at in connection with the disadvantages, they would probably be found to be pretty equally balanced. The question, however, is not one of convenience, though it may be observed that any inconvenience is capable of being immediately obviated by an extension of the powers of the Court by legislative enactment.

The High Court possesses an Extraordinary Civil Jurisdiction of the nature already referred to ; but while in the exercise of this jurisdiction it has the power to make a binding decree upon the parties to a suit removed from a Mofussil Court, and tried and determined by this Court, it has not, I apprehend, the power of executing its decrees, either against the person or property of the suitor, within the jurisdiction of another Court, otherwise than through the intervention of such other Court as provided by Act VIII. of 1859.

The application must therefore be refused.

DENONATH SREEMONY vs. C. S. HOGG AND OTHERS.

The High Court cannot exercise jurisdiction in respect to land which is situate out of its local limits, even though it be in possession of the Receiver.

Mr. Justice Wells:—The plaint in this case is presented against the Receiver of this Court and others under the following circumstances.

In November 1854 the plaintiff purchased, at a sale held in execution of a decree of the Moonsiff of Chowkee Kazneahpookooreah in the Zillah of Nuddea, a parcel of land belonging to the estate of one Bholanauth Chuckerbutty, deceased, and which formed part of a quantity of land mortgaged by Bholanauth Roy in his lifetime to Aushootosh Day and Promothonauth Day. The mortgage-money not having been paid, the mortgagees filed a bill in the late Supreme Court against the mortgagor, and obtained the usual decree for an account and foreclosure, whereby, amongst other things, a receiver was appointed of the mortgaged premises.

The original parties to the suit have all died, and the suit is now pending against their respective representatives. There has been considerable litigation in the Mofussil between the plaintiff and the receiver with respect to the parcel purchased by the plaintiff, the result of which is, that on appeal to the late Sudder Dewanny Adawlut that Court made a decree in favour of the receiver retaining possession, but held that the Courts below were wrong in setting aside the sale to the plaintiff, and that their judgment did not disturb the plaintiff's right to redeem. Pending the appeal, the receiver brought an action, and obtained a decree for back rents.

Upon these facts the plaintiff prays "that this suit may be taken as supplementary to that so commenced by the said Aushootosh Day and Promothonauth Day and the revived suit; and that the plaintiff may be allowed to conduct the said proceedings in the Master's office, and to have the accounts taken of what is due on the mortgage; and if, on taking the account, the said mortgage-debt shall be found to have been paid off, then that the receiver may be forthwith discharged, directed to allow the plaintiff to obtain possession of the said premises, and restrained from taking further proceedings in the said suit against the plaintiff; and if the same shall not have been paid, then that the plaintiff may, on paying to the defendants, other than the said receiver, the amount due on such account, be declared entitled to redeem the said premises, and that the receiver may then be discharged and ordered to give

up possession as aforesaid to the plaintiff, and may be restrained from enforcing his said judgment against the plaintiff; and that, until such accounts be taken, the said receiver be restrained from taking further proceedings thereon, and that the defendants may be ordered to join in all necessary deeds."

It is clear that the plaintiff is, as far as respects his purchase, entitled to stand in the shoes of the mortgagor. But it appears to me that the Court has no jurisdiction to admit this plaint. It is one for land situate out of the local limits of the Ordinary Original Civil Jurisdiction of this Court; and, according to section 12 of the Letters Patent constituting the Court, the Court, in the exercise of its Ordinary Original Civil Jurisdiction, is only empowered to receive, try, and determine suits for land or other immoveable property, if such land or property shall be situate within the local limits of the Ordinary Original Jurisdiction of this Court.

The fact that this suit is only intended to be supplemental to a suit which was pending in the late Supreme Court at the time of its abolition makes no difference, as this is a new suit, and it cannot be said that it comes within the provision contained in Act 24 Vic., chap. 104, section 12, as to pending proceedings in abolished Courts.

It may seem anomalous that the Court cannot exercise jurisdiction in respect to land which, though situate out of its local limits, is in possession of the receiver, and therefore in its possession; but it is in its possession only for the purposes of a suit as to which it has Special Jurisdiction; and the fact of such possession would not justify the Court in exercising a larger jurisdiction than that given to it by the words of the section of the Charter already referred to.

It was stated that if the plaint was not received, the plaintiff would be without remedy. This, however, is a mistake, as there is nothing to prevent the plaintiff from presenting the plaint in the proper Court in the district where the land is situate; and, if dissatisfied with the decision of the Court of first instance, of appealing to the higher Court, and ultimately to this Court in its Appellate Jurisdiction; nor is there anything to prevent him, after he has instituted his suit in the proper Court, from asking this Court, in the exercise of its Extraordinary Original Jurisdiction, to remove it here for trial. The circumstances disclosed in the plaint would justify such an application, and, if made to me, I should not hesitate to comply with it, unless very good cause were shewn to the contrary.

IN THE MATTER OF A. E. CARRAU, AN INFANT.

"*Habeas corpus*"—*The High Court in its equitable jurisdiction has authority to interfere with the legal right of a father to the custody of his child, if he be an improper person.*

Mr. Justice Wells.:—This is an application by a mother to obtain the custody of her child under the following circumstances. The petitioner, Mrs. Alice Carrau, states that she is the wife of William Francis Carrau; that in consequence of the improper conduct of her husband she has been forced to leave his protection, and that he has placed their only child, a girl under six years of age, with his parents, who have refused her access to the child. She also states that her husband has, since her separation from him, been living in open adultery with a Mrs. Gilman.

Considering that the petition disclosed a sufficient *prima facie* case to call for the interference of the Court, I issued a writ of *Habeas corpus* for the production of the child.

In answer to the petition, the father and mother of the husband have put in a joint affidavit, in which they state that the wife, having left her husband's house, lived for some time in the house of one J. Kennedy; that she failed in an attempt to bring about a reconciliation with her husband; that she has not been refused access to the child, and that she has not the means to support and educate the child; but they are silent as to the adultery alleged against the husband and as to his conduct towards his wife.

It appears from the oral evidence that the child is not now in the custody of the grandfather, but of the father; and it is proved that the husband has shamefully and cruelly treated his wife, subjecting her on several occasions to personal violence; that he has been living for some time in a state of adultery with Mrs. Gilman; that his father and mother have admitted Mrs. Gilman into their house, though aware of the adulterous connection between her and their son, while at the same time they have refused to receive their daughter-in law, or allow her access to the child. Under these circumstances I am called upon to decide who is entitled to the lawful custody of the child.

In *Rex v. Greenhill*, 4 Ad. and El. 624, the Court of Queen's Bench held that when a father has the custody of his children, he is not to be deprived of it except under particular circumstances, such as danger to the child, or when there is an apprehension of cruelty or of contamination by some

exhibition of gross profligacy. See also the case of *Rex v. Sir F. Delaval*, 3 Burr 1435, and the more recent cases in *re Hakewill*, 12 C. B. 223, and in *re Pulbrook*, 11 Jur. 185. These latter cases decide that the father is by law entitled to the custody of his lawful children, and that a Court of Common Law has no jurisdiction, except in extreme cases of misconduct, to deprive him of that right. The 2 and 3 Vic., c. 54, has conferred upon the Court of Chancery in England the power of delivering over to the mother children under the age of seven. This statute was introduced as controlling the paternal right to the exclusive custody of his infant child. Two considerations, namely, of marital duty towards the wife and of the interests of the child, are to be consulted; but if these two objects can be obtained consistently with the father's retaining the custody of the child, his common-law paternal right cannot be disturbed. See the judgment of the Vice-Chancellor Turner in *re Halliday*, 17 Jur., p. 56. It is much to be regretted that this statutable power has not been given to the Judges in India. In *Blisset's* case, Lofft. 748, the father having obtained a writ of *Habeas corpus* to recover possession of his female child, six years of age, in the possession of the mother, who at the time of the application was living separate from her husband, Lord Mansfield stated that although the natural right is with the father, the Court possessed the power under certain circumstances to deprive the father of the custody of his child. In *ex parte Skinner* (9 Moo. 278) Best, C.J., stated in reference to *Blisset's* case that it was a clear authority to shew that the power of assigning the custody of a child brought before the Court was discretionary if the father appeared to be an improper person. See also *ex parte McClellan* (1 Dowl. P. C. 85) and *Rex v. Dobbyn* (4 Ad. and Ell. 644). As regards the extent of the equitable jurisdiction of this Court, I take it to be clear that this Court in its equitable jurisdiction has authority to contest the legal rights of the father if the welfare of the infant renders it necessary. Lord Chancellor Eldon in *Wellesley v. the Duke of Beaufort* (2 Rus., p. 1) says: "The Courts of law can enforce the rights of the father, but they are not equal to the office of enforcing the duties of the father." In *re Spence*, 2 Phil. 247, Lord Cottenham says in express terms: "To justify an interference with the father's rights his misconduct must appear to be of such a nature as to be likely to contaminate and corrupt the morals of his children." See also *Anonymous Case* reported in 2 Sim. N. S., p. 54, and in *re Fynn*, 2 DeGex and Sm. 457.

Upon the authority of these cases I am clearly of opinion that the wife ought to have the custody of the child. The insinuation in the affidavit against her character was, in consequence of the evidence, most properly withdrawn

by the learned Counsel Mr. Bell, and it has been established in the most satisfactory manner that, notwithstanding her sufferings both before and after her separation from her husband, her life has been blameless and exemplary throughout.

After leaving her home she took refuge in the house of a Mr. and Mrs. Kennedy, friends of her brother. She afterwards claimed maintenance from her husband; and although the Magistrate awarded her Rs. 30 a month, no portion of this small sum has been paid to her for more than a year; so that she had no alternative but to seek employment, and she is now earning an honest livelihood as a hospital nurse. Her life has been one of extreme misery, and it is to be hoped she will be befriended in her praiseworthy efforts to maintain and educate her child.

It has been proved that the husband has been living in a state of adultery, and that the wife has been refused access to the child. I consider the conduct of Mr. and Mrs. Carrau, senior, highly reprehensible in having kept the mother and child from seeing each other, particularly when that mother's character was such as to entitle her to every kindness and consideration. I am glad I can, in the exercise of the discretionary power vested in me, protect this child from the danger of being brought up under the influence of such a father and such relations. In my judgment she cannot safely be restored to the custody of the father, and I order that the child be forthwith delivered over to the mother.

PROMSOOK CHUNDER v. RAJKISTO MITTER.

Production of Documents.

Mr. Justice Wells :—As the question of the production of documents is one of the greatest importance to the practitioners of this Court, I consider it proper to state my views for their guidance. Considerable difference of opinion exists amongst the Judges of the High Court on the subject, and I myself entertained some doubts respecting the soundness of the opinion I expressed in the first instance. On reflection, however, I still adhere to that opinion, and I believe the Chief Justice entirely concurs with me. The whole case turns on sections 39 and 128 of Act VIII., and it is therefore necessary to examine them with great care. Section 39 provides that: "When the plaintiff sues upon any written document, or relies upon any such document as evidence in support of his claim, he shall produce the same in Court when the plaint

is presented, and shall at the same time deliver a copy of the document to "be filed with the plaint; if the document be an entry in a shop-book or "other book, the plaintiff shall produce the book to the Court, together with "a copy of the entry on which he relies. The Court shall forthwith mark "the document for the purpose of identification; and, after examining and "comparing the copy with the original, shall return the document to the plaintiff. The plaintiff may, if he think proper, deliver the original document "to be filed instead of the copy. The Court may, if it see sufficient cause, "direct any written document so produced to be impounded and kept in the "custody of some officer of the Court, for such period and subject to such "conditions as to the Court shall seem meet. Any document not produced in "Court by the plaintiff when the plaint is presented shall not be received in "evidence on his behalf at the hearing of the suit, without the sanction of the "Court." Now it is perfectly clear that this section prohibits a plaintiff from using any document which he did not produce when the plaint was filed. This is a very wise provision, and its object clearly is to prevent anything like the dishonest fabrication of documents; and it is impossible to arrive at any other conclusion than that the plaintiff is bound under this section to produce at the time the plaint is filed all documents upon which he relies. The next subject for consideration is, whether section 128 alters or in any way modifies section 39. The former section provides that: "The parties "or their pleaders shall bring with them, and have in readiness at the first "hearing of the suit, to be produced when called upon by the Court, all their "documentary evidence of every description which may not already have been "filed in Court, and all documents, writings, or other things which may have "been specified in any notice which may have been served on them respectively "within a reasonable time before the hearing of the suit; and no documentary "evidence of any kind which the parties, or any of them, may desire to produce "shall be received by the Court at any subsequent stage of the proceedings, unless good cause be shown to its satisfaction for the non-production thereof at "the first hearing." In interpreting this section some of the learned Judges appear to have not attached sufficient importance to the distinction between the words employed in the two sections. In section 39 the word used is "produce," in section 128, "file." Bearing in mind, then, the distinction between these words, the two sections are not incompatible with one another. Section 39 provides that all documents shall be produced at the first hearing, and section 128 applies to documents which have been produced, but not filed. There is a discretionary power vested in the Court with reference to the recep-

tion of documents, and I am inclined, in cases of *bond fide* applications, to exercise it largely.

ANUND CHUNDER BANORJEE *v.* WOOMESS CHUNDER ROY.

Act VIII. of 1859—Attendance of witnesses on settlement of issues.

Act VIII. of 1859 confers no authority upon a Judge to issue summonses to a witness to attend on the settlement of issues.

The written statements must be prepared with great care and deliberation so as to dispense altogether with parol evidence.

Mr. Justice Wells made the following remarks with reference to the attendance of witnesses in cases set down for settlement of issues. I suspended my opinion in two cases in which applications were made for summoning witnesses to attend to give evidence on the settlement of issues, as I was anxious to consider the several sections in Act VIII. of 1859 regulating the practice as to summoning witnesses; and, having looked carefully into the sections, I am of opinion that the applications must be refused. The applicant in one case grounded his application on section 162, which provides for the enforcing of the attendance of a party to a suit as a witness, for whose attendance special grounds have been shown to the satisfaction of the Court. I am clearly of opinion that this section does not apply to cases where the summons is for the settlement of issues only, but to cases coming on for final disposal either in the first instance or "*after*" the settlement of issues; and I am confirmed in this view of section 162 by the language used in the following section, which enables the Court to give the party an opportunity to show cause why he should not attend and "*give evidence*;" that is, give evidence at the hearing of the suit on the merits. Section 149 enables parties or their pleaders to obtain, on application to the Court, summonses to witnesses at any time after the issue of the summons to the defendant, if the summons be for the final disposal of the suit, or "*after*" the issues have been recorded, if the summons to the defendant be for the settlement of issues only; so that witnesses are not to be summoned till after the issues have been recorded, if the summons to the defendant be for the settlement of issues only. Section 125 empowers the Court to examine parties or their authorized agents, and this power is confined to the Court; for it never could have been intended to confer on a plaintiff or defendant the power of sum-

moning the opposite party to give evidence on the settlement of issues. This section should be read in connection with section 127, which clearly and distinctly limits the power of examination to the Court, and with the Court alone rests the power of summoning parties; and that discretionary power can only be exercised when the party or his authorized agent cannot supply any further information required by the Court and not disclosed in the written statements. Section 139 empowers the Court to frame the issues from the written statements to be prepared under section 123, "*and if necessary*" from the oral examination of the parties or their authorized agent. Section 151 provides for the payment of witnesses summoned under section 149. And under section 152 it is necessary to specify in the summons the purpose for which the attendance is required; and the expression "*for the purpose of giving evidence,*" or "*to produce a document,*" refers to an attendance at the hearing of the suit on its merits. Sections 149, 151, and 152 relate exclusively to witnesses to be summoned when the suit comes on for final disposal. Section 166 enables the Court, if it shall think it necessary for the ends of justice to examine any party to a suit "*of its own accord in any stage of the suit.*" This discretionary power is to be exercised, not at the instance of any party, but as a voluntary act of the Court induced by considerations of necessity. Section 172 provides when and how witnesses, including parties to a suit who have been summoned as witnesses, are to be examined; and, according to this section, the evidence of all such witnesses is to be taken "*on the day appointed for the hearing of the suit,*" which I understand to mean the hearing on the merits. It has been suggested that, under Act VIII. of 1859, the Mofussil Courts have in some instances allowed summonses to witnesses to attend on the settlement of issues; if this really be the case, I have no hesitation in saying that the Courts below have exceeded their jurisdiction. There is a great objection to disclosing the names of witnesses weeks before the case is finally disposed of, as it would in many instances enable an unscrupulous plaintiff or defendant to tamper with such witnesses, and to meet the case of the opposite party with fabricated evidence. It would, moreover, entail a double expense upon parties if they were expected to produce their witnesses on the settlement of issues as well as at the final hearing, and would at the same time be extremely harassing to witnesses, and especially witnesses living at a distance if they had to attend on two different occasions. The written statements must be prepared with great care and deliberation so as to dispense altogether with parol evidence. I desire it to be clearly understood that this judgment is not intended to limit or interfere with the

discretionary power to be exercised under sections 125 and 126 in the examination of the parties or their authorized agents.

F. BARROW *vs.* HUGH TREVOR POLLOCK.

Section 89, Act VIII. of 1859—Compromise—Remission of Fees.

Section 98, Act VIII. of 1859, is applicable only to Mofussil Courts, and a Judge exercising the ordinary original jurisdiction of the High Court has no power to remit fees under any circumstances.

Mr. Justice Wells :—In this case an application was made under section 98, Act VIII. of 1859, for a remission of fees under the following circumstances. The plaint was for the recovery of a sum of money due on a promissory note. The hearing, which had been fixed for the 11th August, was postponed at the request of both parties, and the suit was subsequently compromised before the settlement of issues. Under section 98 of Act VIII. of 1859, where a suit is adjusted by mutual agreement or compromise, or satisfaction of the plaintiff's claim, the Court is empowered to grant, on the application of the plaintiff, a certificate authorizing him to receive back from the Collector the full amount of stamp-duty paid on the plaint, if the application shall have been presented before the settlement of issues; or half the amount, if presented at any time after the settlement of the issues and before any witness has been examined. This section is applicable to the Mofussil Courts, but is inapplicable to this Court for the following reasons. In the Mofussil Courts the plaintiff is required, at the time of filing his plaint, to pay a stamp-duty on the value of the suit, which in this Court would be tantamount to requiring a plaintiff to pay in advance the "*entire*" fees payable in a suit. It is but reasonable, therefore, that when a suit is cut short by a compromise the "*whole*" stamp duty paid in expectation of the suit being prosecuted to a decree should not be retained; and hence it is that when a suit is compromised, and nothing is done by the Court beyond issuing a summons, the full amount of the stamp-duty is refunded; but when the compromise is delayed till after the settlement of issues, only half the amount of stamp-duty is refunded, the other half being retained for the work done. In this Court a different system prevails: the suitor is not required to make any payment or deposit in advance, and is only charged for the steps taken in the suit; so that at whatever stage a suit is compromised he is only required to pay the fees actually incurred up to that time. The fees belong exclusively to Government; and as

section 98 is inapplicable to this Court, the Judges have no power to remit any fees under any circumstances. *Application refused.*

BIBEE KULSOON *vs.* BIBEE AMEERUNNESSA.

Ejectment title proved—A Hebabil Ewaz or deed of gift made in contemplation of marriage is not a revocable instrument.

Mr. Clarke for the plaintiff.

Mr. Doyne for the defendant.

Mr. Justice Wells:—This is a suit for possession of a piece of land to which the plaintiff claims to be entitled under a *Hebabil Ewaz*, or deed of gift, executed by the defendant in favour of the plaintiff on the 14th day of January 1857. It is admitted that on the 3rd of January 1857 the defendant executed a deed of gift of the land in question in favour of the plaintiff in contemplation of her intended marriage with the defendant's son, and that on the 14th of January, the day of the marriage, Shaik Rohomuttollah, the plaintiff's father, refused to accept the deed of the 3rd of January, on the ground that it was void according to Mahomedan law, because it had not been executed on the day of marriage, and demanded a fresh deed. It is alleged on the part of the plaintiff that the deed under which she seeks to establish her claim was then given; but this is denied by the defendant, who states that when the second deed was brought to her, she declined to execute it, and that it was never executed either by herself or by her authority. The issue I have to try is, whether the plaintiff is entitled to recover possession of the land and premises mentioned in the plaint. The parties and the witnesses to both deeds were all at one time on friendly terms. Shaik Meah Jaun, the grandfather of the plaintiff, is allied to the defendant, not only by the marriage of the plaintiff with the defendant's son, but also by another marriage; and although he takes a particular interest in the plaintiff as his grandchild, it is clear that at one time he had the confidence of both parties, for he appears to have attended Mr. Homfray's office with the defendant's husband in reference to the execution of a cognovit. He played a prominent part in the transactions, and was not only present at the execution of the first deed and first *Mooktearnamah*, but also of the second deed and second *Mooktearnamah*, and speaks to the solemn declaration made before the Magistrate as to both *Mooktearnamahs*. The next witness to the deed, Shaik Rohomuttollah, the father of the plaintiff, is dead. If he had been alive, he would have been a

most important witness, and this action would probably never have been brought. He took an interest in the settlement of the property mentioned in the letters marked C and D; and although, as pointed out by the learned Counsel for the defendant, these letters refer to other property than that comprised in the deed, they, nevertheless, have an important bearing as to the intention of the parties in making the first deed. What was intended by the defendant and her husband Moulvie Ahmed was, that a settlement should be made on account of their son's inability to maintain a wife. Mr. Doyne says that these letters show that there were disputes between the father of the plaintiff and the husband of the defendant from the beginning, and that the defendant's husband intended throughout to play fast and loose and to get a certain portion of his wife's property settled instead of his own, which it was his object to save; but even in that view of the case it is clear that he wanted to settle some property. It has also been stated that it was intended by the parties that this settlement should be a mere temporary arrangement. I can understand a father making an allowance to a son following the profession of the law or some other profession, till he was able to support himself; but that is not the character of the present settlement, which was made in contemplation of an intended marriage, and is absolute in its terms. From my experience in this Court I think I may say that I never met with any class of persons so particular in dealing with landed property as Mahomedans. And it does not appear to me possible that the defendant's husband, who was formerly law-officer of the 24-Pergunnahs and of the District of Burdwan, could have thought that it was open to him, at the end of six months or any other period, to cancel at will a deed such as this is. He has stated that it was the intention of the parties to cancel the deed as soon as his son was able to support himself; but Mr. Doyne has properly repudiated the notion that a document of this character, when once executed, could be trifled with. The execution of the first deed is an admitted fact; and the plaintiff relies upon it as showing that the probabilities of the case are all in her favour, inasmuch as the second deed is, with the exception of the date, in all respects the same as the first; the one, in fact, being a copy of the other. It is unnecessary for me to express any opinion as to the validity of the first deed, because I am satisfied that the second deed is valid and binding as against the defendant. It appears that on the 14th of January the parties met at the house of Shaik Rohomuttollah with a view to the celebration of the marriage, and that Shaik Rohomuttollah was on that day dissatisfied with the position of

things. Believing that the first deed was void, he wished to have another deed substituted for it; and it was in consequence of the action taken by him that the second deed was prepared. The second deed is, word for word, the same as the first deed; and I take it that it was copied from the first deed on the day of the marriage. Shaik Rohomuttollah has passed away; but what could have induced him to proceed with the marriage if he believed that the first deed was invalid, and that the second, which he had caused to be prepared for the protection of his daughter, had not, as alleged by the defendant, been executed by her? Mr. Doyne says that as the marriage feast was prepared, and all parties were present, it would have been a disgrace to the plaintiff if the marriage had not taken place, and that the consequent pressure upon Shaik Rohomuttollah was so great that he was obliged to consent to allow the marriage to proceed, notwithstanding that the second deed had not been executed. But that argument cuts both ways: it applies with equal force to the defendant, upon whom the amount of pressure was as great as upon the plaintiff's father. And it is to be observed that the marriage was in all respects a desirable marriage, because the plaintiff was a young lady possessing a certain amount of property, and occupying a respectable position in life. I think it more than probable that as the defendant executed the first deed, she also executed the second. If she executed the first deed of her own free will, a very slight pressure would be required to induce her to execute a similar conveyance on the day of the marriage. But Mr. Doyne says: "My client refused to do it. She refuses still, and has always refused, and I refer to her evidence." But then comes one of the most important facts in this case, *viz.*, the declaration before the Magistrate. Moulvie Ahmed has denied the execution by his wife, and the production by himself before the Magistrate, of the second *Mooktearnamah*. He has said in his examination-in-chief: "Shortly before the wedding I went before the Magistrate to get the first paper registered in the name of Meah Jaun. I did not go to the Police seven days after the marriage. * * * "As far as my recollection goes, I went to the Police one day when the business was not done, and I went again on the following day. I never went to the Police after the wedding regarding the wedding." I thought, until I saw the first *Mooktearnamah*, that the second *Mooktearnamah* (making mention, as it does, of a previous *Mooktearnamah*) had reference to the first deed. If a fraud has been committed, by whom and when was it concocted? Was it concocted by Meah Jaun? And was it concocted by him immediately after the marriage when all parties were friendly, and when the plaintiff was living with

her husband's parents? Mr. Doyne has observed upon the fact, that Meah Jaun stated in his examination-in-chief that the *Mooktearnamah* was executed on the day of the marriage, and produced before the Magistrate on the same day, whereas it appears that it was produced before the Magistrate on a subsequent day. Meah Jaun was certainly in error as to the day on which the *Mooktearnamah* was produced before the Magistrate, and he has in his cross-examination admitted that he did not remember the day. I believe the second *Mooktearnamah* was executed on the 14th of January, and that the date was afterwards altered to the 21st. Why it was so altered is not disclosed by the evidence. It appears from the declaration written on the *Mooktearnamah* that Moulvie Ahmed and Dost Ally appeared before Kissorychand Mitter, the then Junior Magistrate of Calcutta, on the 21st of January 1857, and, having produced the *Mooktearnamah*, declared that they had seen Ameerunnessa (the defendant) execute it. The declaration itself, and the entry made in reference to it in the police book, show that the declarants and the Magistrate had met face to face. If they had not seen each other, would the Magistrate have signed that declaration, or permitted that entry to be made? It was not necessary to identify the parties, as was the practice when the parties were strangers to the Magistrate; for Moulvie Ahmed has admitted that he and the Magistrate were acquainted with each other. After it was made clear that Moulvie Ahmed had appeared before the Magistrate, he was discarded by Mr. Doyne, who stated that at the time Moulvie Ahmed appeared before the Magistrate he wanted to protect his own property and to make over his wife's. That supposes that he was at that time committing perjury and forgery against his own wife. Mr. Doyne calls upon me to remember that the defendant was his client, and not Moulvie Ahmed. But who is Moulvie Ahmed that his wife is to treat him to-day as capable of committing perjury and forgery against her? If Mr. Doyne had proved that the husband was at enmity with his wife from the beginning of this transaction, then he would be entitled to say: "You must, in considering the case, separate the two." But when it appears that Moulvie Ahmed has never lost his wife's confidence, on the contrary that he has step by step acted as her agent in this and a previous suit, how can it be said that Moulvie Ahmed was adverse to his wife, and must be treated as an adversary? Moulvie Ahmed is utterly to be disbelieved. He has now, at the eleventh hour, turned against his daughter-in-law, in order to get rid of her claim to his wife's property, and he has had the hardihood to come before me and deny upon his solemn oath that he attended before the Magistrate, and made the declaration as to the execution by his wife of the

second *Mooklearnamah*, which there can be no doubt that he did make. I believe he made the declaration, intending at the time to do what was right, though he has since thought proper to pursue an opposite course. The defendant in her evidence states, that the plaintiff, after her marriage, went to live with her, and that accounts for her not being put into immediate possession of the property. It is not likely that she would, while living with her mother-in-law, think of irritating her by asking for a change of possession. It is more likely that she was unwilling to assert her right to possession till the death of the old lady. I cannot help thinking that in consequence of some quarrel the plaintiff left the house of her mother-in-law, and went to her father's house, and that it then occurred to the defendant to dispute the gift which she had made. It is necessary to consider by whom the execution of the second deed was witnessed. The first witness is Meah Jaun, and it is due to him to say that he has acted fairly throughout. He is an old man without any interest beyond the interest he takes in his grandchild, for he takes nothing under the deed. Mr. Doyne has made no observation upon him, except that he is a hostile witness. But so far from being hostile, Mr. Homfray has stated that after he had received from Mr. Goodall the letter of the 4th of June, Shaik Meah Jaun had come to his office with Moulvie Ahmed with a view to bringing the parties to a settlement. The eunuch has stated that Shaik Meah Jaun was a witness; and that his name appeared upon the deed; but he afterwards explained the mistake by saying that No. 5 in Arabic is like Shaik, and so he thought it must be Shaik Meah Jaun; and I am bound to say that the Interpreter, Baboo Shamachurn, whom I have consulted, has confirmed the statement that No. 5 in Arabic is like Shaik. Mahomed Ufzul was not present to see the document executed: he is an outside witness. Meah Jaun says he is ill. As he is a friend of Moulvie Ahmed, why has he not been called by the defendant? Mr. Clarke has called the defendant's husband, though he was not bound to do so; and Mr. Doyne thinks that Mr. Clarke ought also to have called the plaintiff's husband; but that, in my opinion, ought to have been done by the defendant, as it appears that her son, the plaintiff's husband, is living with his parents, and not with his wife. Dost Ally has not been called, and his absence is immaterial, as Moulvie Ahmed who appeared before the Magistrate has been called. It appears that differences having sprung up, Meah Jaun about a year ago commenced proceedings on behalf of the plaintiff against the defendant. What was the conduct of Moulvie Ahmed in that action? He was willing to admit that the plaintiff was entitled to the premises in dispute, and was willing that his wife should execute a cognovit recognising the right of the

plaintiff. Does this not show that Moulvie Ahmed knew at the time that his wife had executed the second deed, and that he had appeared before the Magistrate? At any rate it shows that he was not then prepared to deny the deed. Mr. Homfray had an idea that a cognovit was not a proper document in an ejectment suit. I do not know why he thought so. If Mr. Homfray had gone to the lady, and said, "Your husband has instructed me to bring this to you;" and if she had said to him, "Why should I sign it? I never gave him authority to get a cognovit prepared. I never executed that deed"—such evidence would have carried great weight. But, unfortunately, Mr. Homfray, acting upon his erroneous idea as to a cognovit, did not go to the lady, and we have therefore not the evidence which would have been so important. I am not prepared to accept the defendant's evidence as to the surrender to her of the first deed and first *Mooktearnamah*. Clinging, as she does, to the possession of this property, she has brought herself to swearing what I believe to be untrue. Upon the whole, I have come to the clear conclusion that the second deed was executed by the defendant before her husband, son, Meah Jaun, and the eunuch. I find the issue in favour of the plaintiff, and decree possession with costs.

RAJROOPRAM vs. BUDDOO.

Bailment—Hoondee—Endorsement—Hindoo Law and Custom of Native Merchants.

A party who receives a hoondee for a particular purpose must apply the same accordingly, and neither he nor any third party knowing the facts can, by afterwards receiving the amount, detain the same from the principal.

Query: Whether a hoondee made payable "to order" is, according to Hindoo law and the custom of native merchants, negotiable without a written endorsement by the payee.

Mr. Bell and Mr. Paul for the plaintiff.

Mr. Doyne and Mr. Graham for the defendant.

*Mr. Justice Wells:—*This is a suit instituted for the recovery of Rupees one thousand, the amount of a hoondee drawn at Jungeepore by the defendant's father upon his firm in Calcutta, then carrying on business under the name of Moolchund Hurruckchund. The plaint states that the plaintiff is the

payee and holder of the hoondée, and has not been paid the amount of the hoondée by the defendant. The following issues have been settled :

1. Whether the defendant's father was the drawer of the hoondée mentioned in the plaint.
2. Whether the plaintiff was the holder of the bill at the time of the commencement of this suit.
3. Whether the plaintiff received payment of the hoondée before the commencement of this suit.

It appears from the evidence adduced in the case that in the month of January 1860 one Kritarruck Pundit and Ramsohye Buckit, of Jungeepore, were formerly in partnership as cloth merchants, and employed as their agents a firm in Calcutta trading under the name of Savaram Khosaulchund. In the month of November 1860 the partnership of Kritarruck and Ramsohye was dissolved, and Savaram Khosaulchund received notice of the dissolution. In the early part of July 1861 the plaintiff, being the authorised agent of Kritarruck, and also having an indirect interest in the firm to the extent of a four-anna share, came to Calcutta, and brought with him the hoondée in question. The plaintiff delivered the hoondée to one Gopaul, the gomastah of Savaram Khosaulchund, without having endorsed the same, and at the same time requested Gopaul to purchase cloth, to be paid for out of the proceeds of the hoondée. On the 9th of July the plaintiff called upon Gopaul at the cootee of Savaram Khosaulchund, and on that occasion the plaintiff was informed by Gopaul that the hoondée had been taken in part-payment of an outstanding debt due from the old firm of Ramsohye and Co. On the same day the plaintiff also called at the cootee of Moolchund Hurruckchund, and informed one Gyanchund, the mooneeb of that firm, of the circumstances attending the delivery of the hoondée to Gopaul; and the plaintiff, at the same interview, requested Gyanchund not to accept the hoondée for payment. There was evidence in the case that the plaintiff called again at the cootee of Moolchund Hurruckchund, avowedly for the purpose of delivering a formal written notice; but, owing partly to the carelessness and forgetfulness of the person who prepared the notice, the contents of the document were not satisfactorily proved. On the day the hoondée fell due, *viz.*, the 14th July, the plaintiff called at the defendant's cootee, and was then informed by Gyanchund that Gopaul had received the amount of the hoondée. Gopaul Doss and Gyanchund were called for the purpose of contradicting the testimony of the plaintiff; and at the conclusion of the case I unhesitatingly adopted the evidence of the

plaintiff, and altogether discredited that of Gopaul and Gyanchund. I am clearly of opinion that these two persons combined together for the purpose of depriving the plaintiff and his partners of their just rights in respect of that hoondie; and the fact of Gyanchund paying the bill without any endorsement by the plaintiff is strongly corroborative of the view I entertain as regards the conduct of Gyanchund. Mr. Graham, on behalf of the defendant, contended that, according to Hindoo law and the custom of native merchants and brokers, a hoondie containing, as in the present case, the following words, "pay the balance in Company's rupees to the order of Rajroopram, after ascertaining and taking precaution," is negotiable without a written endorsement; the word translated as "order" having a signification not necessarily importing, as with us, "a writing." It is clear that, according to the law of England, a bill of exchange containing such words would not be negotiable without first being endorsed by the payee. If in this case I had not found, as I have done, that Gyanchund received due notice from the plaintiff not to accept the hoondie, the question raised by Mr. Graham would have presented a very difficult aspect; but it can hardly be contended that, under the circumstances of the present case, Gyanchund was justified in accepting the hoondie. A person who receives a bill for a particular purpose must apply the same accordingly; and neither he nor any third person "*knowing the facts*" can, by afterwards receiving the amount, detain the same from the principal: see *Lloyd vs. Howard*, 15 Q. B. 995. In the case of *Buchanan vs. Findlay*, 9 B. and C. 749, Lord Tenterden said: "If goods or bills are deposited for a specific object, and the bailee will not perform the object, he must return them. The property of the bailor is not divested or transferred until the object is performed." See also the case of *Key vs. Flint*, 8 Taunt. 21. So that, independently of the question of endorsement by the payee, I am of opinion that the plaintiff is entitled to the judgment of the Court, and I find all the issues in his favour.

DENONAUTH RUCKIT v. MUTTY LALL PAUL.

Mofussil Practice—Attachment and Sale.

The words "attachment and sale" in section 203 of Act VIII. of 1859 are to be taken together, and not distributively ; and, taken in that sense, it is clear that a sale of mortgaged premises is to follow an attachment, and is not to be an independent proceeding unconnected with a previous attachment.

The words "otherwise as the case may be" in section 212 mean that the mode of execution is to be adapted in each case to the nature of the particular relief sought to be enforced under the decree.

Mr. Eglinton for the plaintiff.

*Mr. Justice Wells:—*This is a suit by a mortgagee for an account of the mortgage-debt and sale of the mortgaged premises. The defendant has waived his right to be allowed the usual time to redeem, and has consented to an "immediate" sale of the premises and payment of the amount claimed to be due. And, with reference to the form of the decree, the Registrar has suggested the question, whether the premises can be sold under Act VIII. of 1859 without being first attached?

The intention of the Legislature is to be collected from the chapter on execution of decrees.

By section 201, if the decree be for money, it shall be enforced by the imprisonment of the party against whom the decree is made, or by the "attachment and sale" of his property, or by both if necessary. By section 200, if the decree be against a party as the representative of a deceased person, and such decree be for money to be paid out of the property of the deceased person, it may be executed by the "attachment and sale" of such property. The words "attachment and sale" are to be taken together, and not distributively ; and, taken in that sense, it is clear that a sale is to follow an attachment, and is not to be an independent proceeding unconnected with a previous attachment. This view is entirely borne out by the sections relating to sales. Section 249 prescribes the steps to be taken in cases of intended sale, and in doing so proceeds upon the assumption that the property to be sold has been already attached. This appears from the words "proclamation shall be made on the spot where the property is attached."***
 "A written specification to the same effect shall be affixed in the Court-house
 "of the Judge who shall have ordered the sale, and in some conspicuous spot

"in the town or village in which the 'attachment' may have taken place." And if such proclamation and notification be omitted, and substantial injury be caused thereby, the sale may, under section 256, be set aside. Section 263 provides for the delivery of property sold "after" attachment; and in sections 270 and 271 it is assumed that the property sold was "previously" attached.

In considering this question it is not immaterial to notice the order in which a sale is placed in relation to an attachment.

In order to enforce a decree, execution must be applied for under section 207. The application is to be in the form given in section 212, and is to indicate the mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, the arrest and imprisonment of the person named, or attachment of his property, or "*otherwise, as the case may be.*" The words "*otherwise, as the case may be*" must be taken to mean that the mode of execution is to be adapted in each case to the nature of the particular relief sought to be enforced under the decree.

Attachment of the person or property, and of property, either by actual seizure or by prohibitory order, is the "*only*" mode of execution contemplated by the Act, except where the delivery of the property has been specifically decreed and is sought to be enforced under sections 223 and 224. Under section 232, when the amount of the decree is to be levied from property, the Court, it would appear, has no option but to proceed by attachment; the words of the section being "the Court '*shall*' cause the property to be '*attached.*'" The manner in which the attachment is to be executed is pointed out in sections 233—239; then provision is made for the application of money or bank-notes seized under attachment (section 242), for the appointment of a manager of attached property, and postponement of sales for certain purposes (sections 243 and 244), and for the investigation of claims to attached property (246); and then we come to sales in execution of decrees.

It is to be observed that the sales contemplated by the Act are sales "*in execution of decrees,*" not sales directed by the decree itself, as in the present case.

The decree will therefore be as follows:

Declare, by and with the consent of both sides, that the plaintiff is entitled under the Bengallee instrument of mortgage, dated 22nd February 1861, to the principal sum of Rs 700, and to the sum of Rs. 147-14, being interest on such principal sum at the rate of 12 per cent. per annum, calculated down to

this date (making together the sum of Rs. 847-14), and to interest on the said sum of Rs. 847-14 at the rate of 6 per cent. per annum from this date to the date of payment of such last-mentioned sum; and is also entitled to his costs of this suit (to be taxed by the Taxing Officer of this Court), and to interest thereon at the rate of 6 per cent. per annum from the date of taxation to the date of payment thereof. And let the defendants pay to the plaintiff the said sum of Rs. 847-14, with interest as aforesaid, and the said costs when taxed with interest as aforesaid.

As soon as the decree is drawn up, the plaintiff will be in a position to apply to have it enforced by attachment and sale of the property.

KASIM SHAW *vs.* UNNODAPERSAUD CHATTERJEE AND ANOTHER.

Ejectment—Defendants in the position of purchasers “pendente lite” with notice—Doctrine of “Lis pendens”—Has a wider operation here than in England—Is applicable to natives of this country—Distinction between equitable lien created “pendente lite” and an absolute sale. In the latter case, though not in the former, it is necessary to institute a fresh suit.

Mr. Graham and Mr. Woodroffe for the plaintiff.

The Advocate-General and Mr. Bell for the defendants.

Mr. Justice Wells:—In this case the plaintiff seeks to recover possession of 246 parts out of 288 parts of the land and premises No. 14, Smith's Lane, Toltollah, in Calcutta, and to which 246 parts the plaintiff was declared to be entitled by a decree of the late Supreme Court on its Equity side, bearing date the 30th of January 1862, and made in a certain original and revived cause, wherein Bibee Woozeerun and Kasim Shaw were plaintiffs and Khoodee Bibee and another were defendants. It being admitted that the present defendants, though not parties to that suit, derived their title from Khoodee Bibee, who was a party, the following issues were framed:

1.—Whether the decree mentioned in the plaint is binding as against the defendants, who were purchasers from Meer Tonoo, who purchased from Khoodee Bibee, a defendant in that suit.

2.—Whether the plaintiff is entitled to recover possession of 246 parts out of 288 parts of the land and premises mentioned in the plaint.

The case resolves itself into a question of law and fact, and I propose to consider, *firstly*, whether the plaintiff has established his claim by general evidence independent of the decree; and, *secondly*, whether the decree is binding on the present defendants.

This is a suit instituted under Act VIII. of 1859. The plaint was filed on the 2nd of December last, and I am now able, on the 31st of January, after a hearing of three days, to make a decree final in its nature, as far as this Court is concerned. The time occupied by this suit presents a remarkable contrast to the time occupied by the former suit, which was commenced on the 28th of May 1853, was referred to the Master on the 24th of April 1854, continued in the Master's office up to the 1st of October 1861, and was not disposed of (though the question to be determined between the parties to that suit was precisely the same as that in issue between the present parties) till the 30th of January 1862, the date of the final decree.

The plaintiff has put in, as evidence of his title, a conveyance from Kooranee Bibee to Ahmed Kober, and his case is that he is the surviving son of Moonshee Habiboollah Shaw and Bibee Woozeerun, who were married in the *nicca* form; that he was a posthumous child, and was born three or four months after his father's death, which happened on the 24th of July 1852; that the property in dispute belonged to Habiboollah, having been purchased by him from Kooranee Bibee in the *benamee* name of Ahmed Kober, who was the Registrar of the Mahomedan College and the intimate friend of Habiboollah; that his right to this property has been already established by the decree in the former suit; and that the defendants are bound by the decree, inasmuch as they claim through Khoodee Bibee, who was a party to that suit. The defendants, on the other hand, have put in, by way of set-off, against the conveyance produced by the plaintiff, a conveyance from Kooranee Bibee to Urfee Bibee; and their case is that the property belonged to Urfee Bibee, the mother of Habiboollah, having been purchased by her from Kooranee Bibee; that on the death of Urfee Bibee it went to her daughter and heiress Khoodee Bibee, who conveyed it to Meer Tonoo, from whom it was purchased by the defendants; and in effect they traverse the whole of the plaintiff's case, with the exception of the date of Habiboollah's death; for they deny the genuineness of the conveyance to Ahmed Kober, the legitimacy of the plaintiff, and also that the property was the property of Habiboollah. The defendants have thus put in issue a serious question of forgery with reference to the conveyances, as it is quite

impossible that the two can stand together. The former suit was for the administration of the estate of Habiboollah. There is some mystery as to what did take place before that suit was instituted, but as Khodee Bibee was the principal defendant, and sold the property, "*pendente lite*," it is clear she must have been in possession. The evidence, however, supplies no information as to how she dealt with the property previous to the date of the conveyance to Meer Tonoo, or how or when she obtained possession. And during the time the property has been in litigation the mother, the eldest son, and the widow of Habiboollah have passed away; and I expected to hear Khodee Bibee's name mentioned as also being in the list of the dead; and although there is no evidence, one way or the other, as to whether she is dead or alive, the presumption is that she is alive, especially as Mr. Bell has allowed the assertion made this morning by Mr. Graham, that she is both alive and in Calcutta, to remain uncontradicted. If alive, she would have been a material witness for the defendants, and could have supplied the most important information as to the property during the time it was in her possession and as to the circumstances under which she obtained possession of the property, as well as the circumstances attending the sale to Meer Tonoo. As the defendants claim through her it was their duty to have produced her; but it does not appear that any attempt has been made to bring her here or to examine her under a commission, and her absence is wholly unaccounted for.

The question whether Habiboollah died possessed of any property can admit of no doubt. The evidence, though not, perhaps, entirely free from inconsistencies, such as may be expected when the ingenuity of Counsel is exerted in the cross-examination of witnesses, has convinced me that he had property at the time of his death. Akbar Ally, who was formerly a Persian teacher and was well acquainted with the parties, is the principal witness in reference to the execution by Kooranee Bibee of the conveyance to Ahmed Kobeer; and although he was subjected to a rigorous cross-examination, his evidence in the main remains untouched. He says he saw the deed executed, and became an attesting witness; that Shaik Runjoo, who has since died, was also present and attested the execution of the deed; and that Habiboollah paid the purchase-money, and took away the deed; and he has been in a remarkable manner corroborated in one particular by Ahmed Kobeer, the native doctor, who, though called on behalf of the defendants to contradict the plaintiff's case, was so struck with the Urdu signature on the plaintiff's deed as to admit at once that it was the signature of Shaik Runjoo. The

evidence of the other witnesses for the plaintiff, who have spoken as to property left by Habiboollah, is, equally with that of Akbar Ally's, clear, distinct, and on the whole satisfactory. It is important to see whether Habiboollah at the time of his death was in possession of these premises. Upon this point the plaintiff has called the tenants; and what do they say? They say that Habiboollah was their landlord, and received the rents down to his death. As independent witnesses their evidence is of the highest class, and is entitled to every consideration. In cross-examining the witness Azgar, the Advocate-General tried to get from him that he had been an attesting witness to a deed other than the one produced, and, with a view to elicit the contents of that deed, he put a question, which, however, was withdrawn on being objected to. This witness spoke of the purchase by Habiboollah of three distinct parcels of land on three different dates; and I am not inclined to discredit him, as Akbar Sircar in his evidence has made mention of four parcels, and there is other evidence that there was more than one parcel. I think the plaintiff has proved that the deed to Ahmed Kobeer is a genuine document, and that it was made *benamee* for Habiboollah; and he has also proved by unimpeachable evidence that Habiboollah was, up to the time of his death, in possession of the property conveyed by that deed. To the objection that that deed was not produced in the former proceedings is opposed the like objection as to the defendant's deed now produced for the first time. Both deeds in that respect stand precisely on the same footing, and there is nothing that can be said with reference to the non-production in the former suit of either that would not apply with equal force to the other. It is, however, to be observed that the plaintiff's deed, though an important document, is not essential to the success of his case; and if it had no existence, and the defendant had succeeded in establishing his deed, that would not, in my judgment have altered the position of the plaintiff, who in that case would have been entitled to say that the deed was *benamee* for Habiboollah; for, while there is, no evidence that Urfee Bibee had any means of acquiring property, there is ample evidence that Habiboollah, though not a rich man, possessed the means of acquiring property of a moderate value. The two deeds are in the same language, and are alike as to their contents, except that one is to the friend and the other is to the mother of Habiboollah. If the deed to the mother had been in existence at the time it purports to bear date, it is not likely that its existence would have been ignored during the whole period of nine years that the former suit lasted. The defendants in that suit understood their interests better than to have been guilty of anything so suicidal. The non-production

of the plaintiff's deed is capable of being accounted for as the plaintiff was and is an infant, and his mother, who was joined with him as a plaintiff, was dispossessed soon after her husband's death, and may have been ignorant of the existence of such a document; but the same thing cannot be said in reference to the non-production of the other deed, for the defendants were under no disability, as was the case with the infant plaintiff; and, being in possession of the property, were presumably in possession of all documents relating thereto. The doubt as to the genuineness of this document, which arises from its non-production at a time when its production would have been of vital importance to the case of the defendants, is confirmed by the absence of Khoodee Bibee, who, considering her relation to the defendants, ought to have been called by them as their principal witness. Mr. Bell has, in support of the deed to Urfee Bibee, referred to a passage in the state of facts filed by the plaintiffs in the former suit. The passage is this: "The real property, so far as it is known to the plaintiffs, consists of the following parcels, some of which were conveyed and are still standing in the *benamee* name of Urfee Bibee." Then follows a description of property, including the property in dispute. The state of facts was substantially that of the plaintiff's mother; and as it was not required to be verified, it was probably not prepared with the same amount of care that would be given to the preparation of an affidavit or an answer; and it would be a hard measure to hold the infant responsible for any inaccuracies or mis-statements that may be found in it. But nothing of the kind has been shown, and the statement relied on by Mr. Bell, as being inconsistent with the plaintiff's case with reference to the deed to Ahmed Kober, will, if examined, be found not to be so. The statement is not that all the real property, or the particular parcel in dispute, was conveyed to, and was standing in, the *benamee* name of Urfee Bibee, but that the real property, so far as it is known, consists of the following parcels, some of which were conveyed and are still standing in the *benamee* name of Urfee Bibee; it does not exclude the supposition that the property in dispute was not conveyed to Urfee Bibee, so that it might well be that it was not comprised in so much of the property as was conveyed to her. It is not unlikely that the plaintiff's mother, from the circumstances in which she was placed by the conduct of the defendants, was but imperfectly informed as to the facts relating to the real property. She says that, "so far as it is known," which implies an imperfect knowledge; and she also says that some of the real property was conveyed to and was standing in the name of Urfee Bibee, which is a general state-

ment, and points to no particular parcel ; and I believe it was admitted that some of the real property, other than the parcel in dispute, was and is standing in the name of Urfee Bibee. The property in dispute is nowhere stated to be in the name of Urfee Bibee. It was suggested that the suspension of proceedings in the Master's office, which followed the execution of the conveyance from Khoodee Bibee to Meer Tonoo, was owing to her having ceased to have any interest in this property ; but this could hardly have been so, as it appears that the suspension of proceedings did not take place till three months after the date of that conveyance. In my opinion the suspension of proceedings is attributable to an entirely different cause—one which has often produced a similar result, namely, the inability on the part of Khoodee Bibee to supply the funds required to carry on vigorously a heavy and expensive litigation in the Master's office ; and that this was so is rendered more than probable by the fact that her own attorney was unable to obtain payment of the costs due to him without resorting to the extreme measure of levying the amount by the seizure and sale of one of the parcels. The next friend of the plaintiff, who was called and cross-examined with some degree of severity, is entitled, from the manner in which he gave his evidence and other circumstances, to be considered a witness of truth. It does not appear that he has any interest in the suit beyond that of the friend and protector of the infant ; and it is not likely that he could have been induced by any considerations of gain to assume the responsible position he occupies as next friend, especially when it is considered how small the property is, and how little will remain to the infant after the termination of the suit and the settlement of all accounts. His evidence is, that he was a friend of Habiboollah, and that, seeing the infant trampled upon, he took him under his protection, and determined to assert his rights. The result shows that he adopted a wise and benevolent course.

It having been proved that Habiboollah died possessed of property, it becomes necessary to enquire who are his heirs. It is admitted that if the property in dispute had been Urfee Bibee's, the plaintiff, if his legitimacy were established, would have been entitled to a moiety, and that Khoodee Bibee could not have conveyed more than the other moiety. The question as to the legitimacy of the plaintiff, though raised as one of the principal questions in the case, was rather given up by Mr. Bell after the plaintiff's witnesses had been examined. The evidence upon this point is very conclusive. Akbar Ally, Azgar, and Mohobut Khan, the friends of the family, Mungle Dye, the

midwife who assisted on the occasion of the plaintiff's birth, Maria Rebeiro, a near neighbour, and Sundee Bibee, the mother-in-law of Wozeerun's sister, who was present at the plaintiff's birth, which took place in her own house, have all spoken to the fact that the plaintiff was born within four, five, or six months after the death of Habiboollah; and I consider the evidence of Maria Rebeiro particularly trustworthy, as she is in no way connected with the parties, and is not even of the same religion. Mr. Bell objected to the admissibility of her evidence as to the statement made to her by Bibee Wozeerun, that she was with child at the time of Habiboollah's death, on the ground of its not being a declaration as to legitimacy; but he did not press the objection, as it is clear that the declaration of a mother, since deceased, that she was with child at the time of her husband's death, is a declaration bearing directly upon the question of legitimacy. Mr. Biddle, who was the plaintiff's attorney in the former suit, is dead; but his managing clerk was called, and his evidence is consistent with the fact that the child was begotten in the lifetime of Habiboollah. The plaintiff, having established his legitimacy in the former suit, may very well have come unprepared to meet so serious a question in the present suit, but he has met it in the most satisfactory manner; and upon the evidence before me I have come to the clear conclusion that the plaintiff was born sometime within six months after the death of Habiboollah. It has been proved that Bibee Wozeerun was married in the *nicca* form to Habiboollah; and there is no question that such a marriage, provided the parties were under no disability at the time of contracting the same, is valid according to Mahomedan law. It was suggested that Bibee Wozeerun was under disability at the time of her marriage with Habiboollah, inasmuch as she was at that time the *nicca* wife of another man, one Kurreem Istrywallah. It is not, however, necessary to consider the point, as it was afterwards abandoned. I reject the evidence of the defendants' witnesses. The native doctor's evidence is not only contradictory in itself, but is also opposed to the plaintiff's document, which I hold to be genuine. The evidence of Meer Tonoo is very unsatisfactory. He is deeply interested in the issue of this case, as the property in dispute was conveyed to him by Khoodee Bibee, and was conveyed by him to the defendants; and lest he should, in the event of this case being decided against the defendants, be called upon by them to return the purchase-money, he took care in his evidence to inform them how utterly unable he is to meet any demand. The evidence of the last witness, Dhone Bibee, was, I believe, discarded by the defendants' own Counsel. She was called to prove that an improper intimacy had existed between Akbar Sirca

and Bibee Woonderun ; but her evidence was rather opposed, than otherwise, to such an imputation. The plaintiff has proved his legitimacy and his right to this property, and he is therefore entitled, independently of the question of *lis pendens*, to have the second issue found in his favour.

In determining the first issue it is necessary to consider what is the doctrine of *lis pendens*. The doctrine is accurately stated by Mr. Justice Story as follows : " Every man is presumed to be attentive to what passes " in the Courts of Justice of the State or Sovereignty where he resides, and " therefore a purchase made of property actually in litigation *pendente lite* " for a valuable consideration, and without any express or implied notice in " point of fact, affects the purchaser in the same way as if he had such " notice ; and he will accordingly be bound by the judgment or decree in " the suit." (*Story's Equity Jurisprudence*, section 405.) In England the doctrine has a narrower operation ; for there *lis pendens*, unless registered, would not bind a purchaser or mortgagee without express notice (2 Vic., cap. 11, s. 7). The statutable provision, however, which requires *lis pendens* to be registered in England, does not extend to this country, and therefore the doctrine has a wider operation here.

The rule of *lis pendens* is that a purchaser *pendente lite* is bound by the decree made against the person from whom he purchases. (*The Bishop of Winchester vs. Paine*, 11 Ves. 194.) Ordinarily, it is true the decree of a Court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of a suit is held bound by a decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party to the suit. Where there is a real and fair purchase without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy, for otherwise alienations made during a suit might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim "*Pendente lite nihil innovetur*," the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence, and it does not vary them. A *lis pendens*, however, being only a general notice of an equity to all the world, does not affect any particular person with a fraud, unless such person had also special notice of the title in dispute in the suit. (*Story's Equity Jurisprudence*, section 406.)

It is suggested that in conveying to Meer Tonoo, Khoodee Bibee acted in collusion with the next friend in the former suit, and that that circumstance is sufficient to create in favour of the defendants an exception to the general rule of *lis pendens*. There could have been no collusion with the plaintiff himself as he is an infant, and there is no evidence of collusion with the next friend. The suspension of proceedings in the Master's office, from which I am expected to infer collusion, has, I think, been accounted for; at any rate, it can only be treated as a circumstance of suspicion: it does not amount to proof. Khoodee Bibee was represented by a respectable Solicitor, and it is impossible to suppose that he would, however anxious to serve the interests of his client, have lent himself to anything like a fraudulent act.

A purchaser *pendente lite* for valuable consideration and without notice was, prior to 2 Vic. cap. 11, bound by the decree, although the *lis pendens* had not been registered, and also by an interlocutory decree or a decree to account (*Tudor's Leading Cases*, Vol. II., p. 53). And if a purchaser *pendente lite* for valuable consideration *without* notice would have been bound by the decree, *a fortiori* are the defendants bound, as they stand in the position of purchasers *pendente lite* for valuable consideration *with* notice; for they claim through Meer Tonoo, who, as appears from his own evidence, was not only present when the pretended conveyance to Urfee Bibee was executed, but was a purchaser *pendente lite* with notice. To affect a purchaser there ought to be a close and continued prosecution of the *lis pendens* (*Preston vs. Tubbin*, 1 Vern. 286); and in the present case I find that there was a close and continued prosecution of the *lis pendens* up to the time of the purchase. The suspension of proceedings did not take place till long afterwards. The pendency of a suit will not prevent the defendant from selling the property, the subject of the suit; but the purchase will in no manner affect the right of the plaintiff, except so far as it may be necessary to go against the purchaser if he obtain a transfer of the legal estate (*Metcalf vs. Pulvertoff*, 1 Ves. and Beam. 180, 2 Ves and Beam. 200; *Lundon vs. Morris*, 5 Sim. 247). As the plaintiff's right was not affected by the sale *pendente lite*, he is entitled to relief as against the defendants, who, having purchased from Meer Tonoo what he had no right to sell, have their remedy over against him. Decrees of the Courts of Equity are not themselves notice to a purchaser. Decrees, however, which do not put an end to the suit as decrees to account are of themselves notice to a purchaser, (*Worsley vs. Earl of Scarborough*, 3 Atk. 392; *Higgins vs. Shaw*, 2 Dr. and War. 356). The decree pending the proceedings under

which the purchase by Meer Tonoo was made was a decree to account, and was, therefore, in itself notice to the purchaser through whom the defendants claim. I find in the books a distinction between an equitable lien created *pendente lite* and an absolute sale by which the legal estate is transferred. In the former case the person entitled to the lien may be made a party to the suit pending at the time when his claim arose; but in the latter case, the rule in which must govern the present case, it is necessary to institute a fresh suit.

It was suggested by Mr. Bell, as a new question, whether the doctrine of *lis pendens* is applicable to natives. There can be no doubt that it is. The principles both of Equity and Common Law are applicable to natives, and it cannot be otherwise as regards an equitable principle of universal application such as this is.

As the defendants are clearly affected with *lis pendens*, they cannot escape the consequences resulting from the application of this doctrine. There is no doubt that they purchased for valuable consideration; but what did they purchase? A title which it is impossible to maintain against the superior title of the plaintiff.

It is satisfactory to know that the plaintiff's case does not rest upon the doctrine of *lis pendens* alone: it is supported by independent evidence, sufficient in itself to entitle him to relief; so that in calling in to his aid the doctrine of *lis pendens*, he has done more than his case required.

I find the second issue also for the plaintiff, and decree him possession with mesne-profits. Costs to follow the result.

Decree accordingly.

SREEHURREY PAUL vs. NILMONEY SEN.

A joint debt cannot be amalgamated by a colourable assignment with a personal debt so as to give the assignee the right to sue in respect of both debts.

Mr. Bell for the plaintiff.

Mr. Dove for the defendant.

Mr. Justice Wells.—This is a suit to recover the sum of Rupees 519 and 15 annas for goods sold and delivered.

The issue which was framed and recorded is :

1.—Whether the plaintiff is entitled to recover from the defendant the amount mentioned in the plaint, or any part thereof.

The plaint as framed is calculated to mislead. It seeks to recover the sum of Rupees 519 and 15 annas for goods sold and delivered by the plaintiff to the defendant, from which it would be natural to infer that both the parties were interested in the whole of the goods ; and it makes no mention of an assignment, although a portion of the debt is claimed under an assignment from Gunganarain Nuggur. The sum of Rupees 90 and 15 annas is claimed under the assignment, and the balance Rupees 420 is claimed independently of the assignment. The defendant at the commencement of the case admitted that the sum of Rupees 320 was due to the plaintiff independently of the assignment, and he has merely put the plaintiff to proof as to the larger sum of Rupees 420 being due, without offering any evidence in contradiction. The plaintiff having established his case as to the sum of Rupees 420, the only question that remains is as to the sum of Rupees 90 and 15 annas claimed under the assignment.

It appears from the plaintiff's evidence that Gunganarain Nuggur was his partner in the business carried on in the name of Gunganarain Nuggur to the extent of an eight-anna share ; and although Gunganarain Nuggur has denied the partnership, and has claimed for himself no higher position than that of a servant, the plaintiff cannot complain if I adopt his evidence upon this point. The plaintiff could not have brought one action in the Small Cause Court in respect of both debts, not only because the amount of both debts is over 500 rupees, but because Gunganarain Nuggur could not have been joined as a plaintiff in such an action ; for although he had an interest in one of the debts, he had no interest in the other. Nor could the plaintiff have sued in this Court separately in respect of each debt, the amount of each being below five hundred rupees. In order, therefore, to give this Court jurisdiction, he obtains from his partner an assignment of the partnership-debt, and tacks it on to his own personal debt. The assignment is of the whole debt, and not merely of the assignor's interest. It was not necessary, in order to vest the debt in the plaintiff, that the assignor should have assigned more than his interest, or that the plaintiff should have paid the assignor, in consideration for the assignment, more than the value of his interest ; but the parties were not very particular, as the payment was a mere fiction and the assignment a mere colourable proceeding.

At law the plaintiff would not be entitled to recover in respect of the assigned debt, there being no proof whatever that the debtor assented to the transfer (*Crawford vs. Gurney*, 9 Bing. 372; *Hodson vs. Anderson*, 3 B. and C. 842); and although under certain circumstances Courts of Equity give effect to assignments of debt, yet, as stated by Mr. Doyne, in order to obtain equitable relief, it is indispensable that the assignee should give notice of the assignment to the debtor (*Foster vs. Blackburn*, 1 M. and K. 297.) In the present case there is no evidence of any such notice having been given prior to the commencement of the suit; and I may observe that the Court adjourned the case when it first came on, on the ground that the defendant had received no notice that a portion of the claim had reference to the assigned debt. It appears from the evidence of the plaintiff that the consideration-money was nominally paid to his partner, and would be returned to the bill of the partnership, and that being so, the assignor would be a necessary party to a bill to enforce the right of the assignee, as it is clear the assignment was not absolute and unconditional. At law, as admitted by Mr. Bell, the plaintiff would not be entitled to recover the amount represented by the assigned debt without suing in the name of the original creditor (*Ryall vs. Rowles*, 1 Ves. J. 353); and the assignee of a debt is not entitled to relief in equity unless the assignor prevents the assignee suing at law (*Hammond vs. Messenger*, 9 Sim. 327).

I am glad that I am able to arrive at a conclusion adverse to the plaintiff upon the question of this assigned debt, as the assignment was a mere fiction, and was made only for the purpose of enabling the plaintiff to increase the amount of his claim so as to give this Court jurisdiction. It is the first time it has ever been attempted to sue in this Court in respect of amalgamated claims; and if it were once held that this can be done, it would not be long before this Court would be deluged with cases made up of small claims united by means of assignments of the nature of the assignment in the present case, which it would be the interest of native managers to procure. The defendant, too, in many cases, while willing to admit most of the amalgamated claims, would find himself in the position of one who has to choose between one of two hard alternatives, either that of submitting to a wrong or that of incurring a heavy expense in order to contest one or two of the claims—it may be minor ones—which might have been contested in the Small Cause Court at comparatively small expense.

Verdict for Rupees 420, with interest at 6 per cent. from this date. Each party to pay his own costs.

SREEMUTTY SOUDAMONEY DOSSEE *v.* JUGGOMOHUN SEN AND ANOTHER.

Delinue—Damages—A portion of the costs awarded to the losing party in the exercise of the discretionary power given by Act VIII. of 1859, section 187.

Mr. Woodroffe for the plaintiff.

Mr. Bell for the defendant.

Mr. Justice Wells:—This is a suit to recover certain gold and silver ornaments and utensils, or the sum of Rupees five hundred and nine, the value thereof as stated in the plaint.

The issues which were framed and recorded are :

1.—Whether the defendants possessed themselves of the articles mentioned in the plaint, and whether they detain the said articles from the plaintiff.

2.—Whether the plaintiff is entitled to recover any and what damages for such illegal detention.

The case of the plaintiff is that the gold and silver ornaments belonged to her, and the utensils to her husband, and that on the death of her husband, who at the time of his death was living with her in the house of his brother, the defendant Juggomohun Sen, she took off the ornaments belonging to her, and left them, together with the utensils belonging to her husband, with the defendants, who have illegally detained them from her. The evidence by which she seeks to establish her case is far from satisfactory; but in the absence of the defendants, who, I was led to expect, would be here to-day to support their case, but who have not come, although I allowed the case to stand over for some time to admit of their being brought, I am constrained to give effect to the evidence given on behalf of the plaintiffs, such as it is. The value of the articles as stated in the plaint has been greatly exaggerated. No evidence upon which I can safely act has been given as to the value, but the plaintiff's father has stated that the value would not be more than three or four hundred rupees; and I consider I shall be dealing liberally towards the plaintiff if I fix the value at three hundred and six rupees, which will be the amount of my verdict.

With reference to the question of costs, I award 100 rupees to the defendant, on the ground that, in my judgment, this action ought not to have been brought in this Court; for upon the admission of the plaintiff's father, who I consider is the real plaintiff in this case, the articles were not worth

more than three or four hundred rupees; and as not a single competent witness was called to speak to the value of the articles, I very much doubt whether they were worth more than half the amount stated in the plaint. The suit in being instituted here has operated oppressively against the defendants, whose absence I much regret, as it is not improbable they might have successfully met the weak case launched against them. This, I believe, is the second case in which I have felt it my duty to award a portion of the costs to the losing party in the exercise of the discretionary power conferred by Act VIII. of 1859, section 187.

IN THE MATTER OF HENRY SAMUEL ELDRED.

Habeas corpus.

A person placed in a Lunatic Asylum under section 390 of the Criminal Procedure Code is detained there after the recovery of his reason: Held that such detention was wrongful, but not illegal.

The Advocate-General appeared for the Crown.

Mr. Eglinton for the applicant.

The Advocate-General said he appeared on behalf of the Crown in consequence of the notice served, calling on it to show cause why Eldred should not be made over to the custody of the Sheriff to stand his trial or be discharged. As regarded that part of the application which asked that he might be handed over to the Sheriff as on a committal, he would have been quite ready to accede to it but for the fact that there was no original warrant which would justify the Sheriff, but only a copy; and it would be desirable on all grounds, therefore, that the matter should stand over for a few days until that warrant and committal were received from Saharanpore. As regarded the other branch of the application, there seemed to be abroad some misapprehension that the Magistrate had acted illegally; but it appeared from correspondence which he (the Advocate-General) had seen that the Magistrate in postponing the trial of the case when it transpired that Eldred was insane had acted under the advice throughout of Mr. Cowie. The following appeared to be the facts. In May 1862 a charge of breach of trust and embezzlement of about Rs. 4,000 was made against Eldred, and investigated by Mr. Vans Agnew, then the Magistrate of Saharanpore. Depositions were

aken, and the case was about to be completed and sent down for trial here, when it appeared Eldred was insane; and then under advice, and under the provisions of the Criminal Procedure Act, section 390, he was sent to the Roorkee Asylum by the orders of the Local Government. From thence, after obtaining the best treatment, he was forwarded to Calcutta; and, having recovered his reason, he was, under section 371 of the Act, amenable to the jurisdiction of the Magistrate for the purpose of completing the depositions and commitment.

Mr. Justice Wells asked what explanation could be given of the detention from the 2nd of February, when the man was declared sane.

The Advocate-General regretted that he was not in a position to give the requisite explanation, but probably grounds of explanation would have been found to exist if there had been time for the enquiry: possibly it was in part owing to the matter requiring the orders of the North-West Government. But the real matter now for determination was one of law arising on the 391st section, inasmuch as the proposal he had made of letting the decision of the matter stand over for a few days to make complete the criminal proceedings from Saharanpore so as to justify the Sheriff in taking charge had not been acceded to; and he submitted that the accused was in legal custody, and liable to be sent back to Saharanpore, for the purpose of completing the charge. That was an undesirable result, and one which he would gladly avoid if possible; but he had no authority otherwise to interfere with the administration of the law so as to allow of the applicant being discharged.

Mr. Justice Wells said there could be no arrangement of a criminal charge.

The Advocate-General did not consider this as in any sense a compromise. The application rested with the Court, and the suggestion he had made would best obviate the difficulty, and produce the least harsh result.

Mr. Justice Wells then asked if the prosecution would be proceeded with, and if the Advocate-General made the demand on behalf of the Magistrate.

The Advocate-General considered himself authorised to do so, the case having been on the point of being sent down for trial on depositions which Mr. Cowie had considered clear, and having been only suspended by the insanity intervening.

Mr. Justice Wells:—Henry Samuel Eldred having been produced before me on Friday last under a *Habeas corpus*, I directed that a notice should be served on the Solicitor for Government to show cause this morning why this man

should not be made over to the custody of the Civil authorities for the purpose of taking his trial on the charge of embezzlement under which he was originally arrested, or be set at large; and the Advocate-General has now appeared to show cause. I do not understand the bearing of the observation made by the learned Advocate-General, that the facts had been misapprehended. In my judgment given on Friday I have stated that everything appeared to have been done regularly up to the 2nd of February, when the visitors, with the concurrence of Dr. Payne, reported that Eldred was in a sound state of mind, and fit to take his trial; and the only mistake that appears to have occurred in my judgment—not as delivered, but as reported—was as to Eldred's state of mind when he was first sent to Dr. Payne. Dr. Payne was not examined as to that. His examination was confined to the state of mind of this man from and after the 2nd of February. It has been proved that this man has been sane since the 2nd of February, and that the Government received notice of his sanity on that date; they ought, therefore, at once to have removed him into the custody of the Civil authorities. But it was thought necessary before doing anything to communicate with the authorities in the North-West. That might have been done by telegram in a few hours; and where the liberty of a subject is concerned, the quickest mode of communication ought surely to have been adopted. I make these observations because the Advocate-General has not been instructed to offer any explanation as to the cause of the detention of Eldred in the Lunatic Asylum for more than two months after the Government had been apprised by their own officers that he was no longer a lunatic. The liberty of the subject has always been considered a question of the greatest importance in England; and no man either there or here can be kept in illegal custody for a single moment. If this man is in illegal custody he is entitled to be instantly discharged. But can it be said that he is in illegal custody? If criminal proceedings had not been pending against him, his detention would have been clearly illegal; but it appears that he was arrested under a charge of embezzlement, and was sent to the Lunatic Asylum, instead of being committed for trial, because there was reason to believe that he was insane. His sanity having now been proved, the Advocate-General appears on behalf of the Mofussil authorities, and applies, under section 391 of the Criminal Procedure Code, to have Eldred returned to them, in order that they may proceed with the enquiry commenced before Eldred was sent to the Lunatic Asylum. Under the circumstances, I cannot say that the man is in illegal custody, or that the Mofussil authorities are not entitled to have him returned to them; but the demand to return him should have been made

long ago, and should not have been delayed till forced upon Government by an application for a *Habeas corpus*—an application made under very peculiar circumstances, having been made at the instance of Eldred, who escaped from the Lunatic Asylum, and, after instructing his attorney, returned to the asylum — an application, too, but for which this man might have remained in the Lunatic Asylum for an indefinite period. The delay, however, which has occurred would not justify me in refusing to comply with the demand now made on behalf of the Mofussil authorities. But it is for the Government to consider whether they will incur the responsibility of sending this man to the Mofussil, and proceeding with the enquiry, after having wrongfully, if not illegally, detained him in the Lunatic Asylum for a period of more than two months. I think it right to state that, unless he is immediately removed from the Lunatic Asylum, I shall, on a further application being made to me, not hesitate to discharge him.

IN RE THAKOORMONY DOSSEE.

Rule "nisi" for a "Habeas corpus" to bring a Hindoo purdah lady before the Court on the ground of her detention from her husband against her will—Commission to ascertain her wishes.

Mr. Eglinton in this case, on behalf of Muttyloll Mitter, the husband of a Hindoo woman, Thakoormoney Dossee, had obtained a rule *nisi* calling upon the father of the latter, Roopnarain Ghose, to show cause why a writ of *Habeas corpus* should not issue to bring Thakoormoney before the Court. The affidavit upon which the rule was granted set forth that the husband had not claimed his wife from her family for seven years in consequence of his having been in Government employ in the North-West Provinces, and alleged that the applicant had some time ago become a Christian, which he believed led her relations, and especially her father, to detain her from him ; such detention being, in fact, against her own wish.

Mr. Justice Wells in granting the rule *nisi* directed a Commission to issue to examine the wife as to the grounds of her living apart from her husband, and the return set out that she was not detained against her will by any one, but only refused to return to her husband because he was a Christian.

Mr. Bell for the father, on the above return, now moved that the rule be discharged with costs, including those of the Commission. It was clear that the wife was not detained against her will, and hence the writ of *Habeas corpus* could not issue, and the plaintiff must therefore pay the costs incurred by the application.

Mr. Eglinton contra said that it was impossible to contend, after the return, that the wife was detained against her will, under which circumstances the rule for a *Habeas corpus* must be discharged. It was clear, however, that the merits were with the applicant. No charge of desertion, cruelty, or impropriety was alleged against him by the wife, whose sole reason, on her own admission, for refusing to return to him was that he had become a Christian. This reason was wholly insufficient as regarded the merits; and it was clear, therefore, that the husband had reasonable ground for applying to the Court, and the wife should be directed to pay the costs. As to the neglect of the husband to apply for seven years, it was disposed of by the fact that he was a person in Government employ, on a very small salary, in the North-West Provinces, which were not till lately easy of access to Calcutta. The wife herself, moreover, did not suggest any cause of complaint.

Mr. Justice Wells said that this was an application by a husband against a father in whose house the wife was residing. The affidavit on which the rule was granted alleged that she was influenced by her father against returning to the applicant. It was clear that the husband had remained content without any effort to recover his wife for seven years, and the explanation urged for his conduct in that respect was an alleged difficulty in getting to Calcutta before the railway was opened, which, however, he thought was an extremely indifferent excuse for a husband not returning to his wife.

Mr. Eglinton said that the poverty of the applicant, and the impossibility of leaving his appointment, from which he only derived a few rupees a month, and the expenses of a journey to Calcutta before the opening of the railway were the reasons assigned by him for the inaction of the applicant. The wife suggested no cause of complaint.

Mr. Justice Wells said it was clear that the husband had made no attempt to see his wife for seven years, till within the last few days, when on her refusing to return to him he applied to this Court for a *Habeas corpus*. This was not a question of restitution of conjugal rights. It arose on an application for a writ of *Habeas corpus*, and the essence of the case was, whether or not the

wife was detained against her will. With the view of satisfying himself upon that point he framed questions which he directed to be put to the lady, under a Commission issued for that purpose, to see whether there was, in fact, any such detention. The return clearly showed that she was not detained against her will; and it also appeared, as truly stated by Mr. Eglinton, that her only reason for not returning to her husband was that the latter was a Christian. This latter ground was pressed, but it could not avail under the circumstances of the case, where the only question which could arise was, whether the lady was kept away against her will, which was clearly not the case. Probably, had the applicant not been a Christian, the application would not have been made; but, however that might be, it was clear that he could but apply the law to the only question of fact in this matter, which was, whether there was a forcible detention of the wife, and that not being so, the rule must be discharged.

The only remaining question was as to the costs. He thought no sound reason had been given for the inaction of the husband for seven years. Under those circumstances, the father had acted properly in giving a home to his daughter; and as it appeared that he did not detain her against her will, he ought not to be visited with the costs.

Rule discharged with costs.

TARRUCKNAUTH PAULIT *vs.* GLADSTONE AND OTHERS.

An assignment made "bona fide" and for valuable consideration, before execution put in and without notice of claim of execution-creditor, held not to be void under the Statute 13 Eliz., c. 5.

Mr. Eglinton and Mr. Woodroffe for the plaintiff.

Mr. Bell and Mr. Paul for Grant, Smith & Co.

Mr. Wilkinson for S. Gladstone, the Sheriff.

This action was brought to try whether a certain deed dated the 24th day of March 1863, and purporting to have been made between one Thomas Roxburgh Gordon, a ship-chandler lately carrying on business in the Strand in Calcutta, and the plaintiff—"whereby the said T. R. Gordon assigned, by way of mortgage to the plaintiff, the good-will, stock-in-trade, furniture, goods, chattels, effects, outstandings, and premises then belonging to, or which should thereafter belong to, the said T. R. Gordon in the trade and business of a ship-chandler; and the right and interest of the said T. R. Gordon in the lease of the premises

wherein the said trade and business was then carried on ; and all other trade and business which the said T. R. Gordon should thereafter carry on, together with all future property and credits to arise thereupon ; and all the office and shop furniture, books and documents, credits, effects, and sums of money then belonging, or thereafter to belong, to the said business, to secure the sum of Rs. 20,000 alleged to have been advanced by the plaintiff to the said T. R. Gordon"—was a valid deed and good against creditors ; and whether the Sheriff, by reason of a writ of execution and attachment issued in a suit, in which the now defendants, Messrs. Grant, Smith & Co., were plaintiffs, and the said T. R. Gordon was defendant, was justified in law in seizing the said premises, stock-in-trade, &c., under circumstances which will appear in the arguments of Counsel for the respective parties and in the judgment delivered by Mr. Justice Wells.

Mr. Eglinton in opening the case said his client was a young and inexperienced man who had only lately left College, and was, therefore, but little acquainted with business matters. That he had been introduced to Mr. Gordon, whose pecuniary position was far from flourishing, and who was endeavouring to raise funds to enable him to settle certain pressing claims. One of these was a claim by his late banian, one Utoolchunder Mookerjee, who had a seizure on his premises and goods for about Rs. 6,000. After some enquiries of Gordon respecting his position, Tarrucknauth Paulit agreed to advance the sum of Rs. 20,000, which he did in two separate sums of Rs. 9,000 and 11,000, and become Gordon's banian. That Gordon, on the first sum being paid, wrote a letter to the plaintiff, authorising him to take charge of all his stock-in-trade then in Gordon's store-house in 10-3 Strand as a security for the loan. The plaintiff thereupon took possession on the 16th of March, several days before the defendants, Grant, Smith and Co., had obtained their decree against Gordon. The second sum of Rs. 11,000 was advanced on the 25th of March, and the plaintiff then obtained, as security for the whole amount, the deed in question. He should be able to prove the actual payment of these sums by the plaintiff to Gordon, and their payment over to Gordon's creditors, and that the plaintiff was entirely ignorant of the extent of Gordon's embarrassments ; also he should prove the *bond fide* nature of the transactions as far as the plaintiff was concerned. He submitted that if he satisfied the Court in these particulars, his client was entitled to have the deed declared valid, and not fraudulent against creditors. In support of this argument he cited the case of *Wood vs. Dixie*, 7 Q. B., p. 892., which decides that a sale of property for good consideration is

not, either at Common Law or under the Statute 13 Eliz., c. 5, fraudulent and void merely because it is made with the view to defeat the expected execution of a judgment-creditor. In conclusion the learned Counsel argued that the Sheriff was not justified in seizing immoveable property where he found a claimant in possession; his duty, under the 3rd section of Act VI. of 1855, being to sell, and not to seize.

Tarrucknauth Paulit, the plaintiff, was called to prove the above case, and his evidence was corroborated in all material points by Mr. Gordon and several other witnesses. He was cross-examined at considerable length by Mr. Bell, with a view of showing that he was aware of the full extent of Gordon's hopeless embarrassments, and that his conduct showed gross negligence in not making proper enquiries when he found out that Gordon was in debt.

Mr. Bell for the defendants, Grant, Smith and Co., submitted to the Court that no satisfactory evidence had been offered by the plaintiff to show from what source the large sum of money had been raised by him so as to entitle him to treat the purchase as his own. Apart from the question of fraud or no fraud in the plaintiff, he contended that the plaintiff's conduct had throughout exhibited the most gross and culpable negligence, and that every circumstance of the case should have put him upon notice of the real nature of Gordon's affairs, which he throughout seemed to have wilfully closed his eyes against, and that he must suffer the penalty which the law attaches to purchasers with notice of the prior claims of others. There was no possession here: at the most it was only a banian's possession, and that was not such a possession as the law would consider sufficient to take the case out of the statute. The evidence showed that plaintiff was there merely in the discharge of his duties as banian, and that Gordon was still carrying on the business in his own name. There was no parting with possession either of the business or of the premises. Before the plaintiff could support this action he must show, *first*, an absence of fraud on the part of the assignor; and, *secondly*, *bond fides* on the part of the assignee. Fraud on Gordon's part had been most clearly proved. The assignment was not *bond fide* for the payment of the entire body of creditors: it was merely to pay off a few who were pressing their claims against him.

Mr Justice Wells said he was by no means certain that Gordon had not a *bond fide* belief that he would be able to carry on after the influx of new capital. He had not to consider the subsequent assignment.

Mr. Bell said that the case could not be put higher than that the assignment was for the benefit of one creditor alone. Where the object was to benefit one, and defeat all others, it would be a fraudulent preference as laid down in *Bott vs. Smith*, 21 Bea. 511. In that case, where a deed was in such a form as to defeat the creditors, and executed with that intention, it was declared void as against creditors, though full consideration was given, and the Master of the Rolls set it aside as against the creditors. Here Gordon assigns away everything he has in the world, and leaves nothing for his creditors. The case of *Graham vs. Furber*, 14 C. B. 410, is a strong case against the plaintiff. In that case A, a trader, being in difficulties, and having certain executions against him, assigned all his goods to the defendant by bill of sale from the Sheriff, with an understanding that they should remain on A's premises to enable him to re-purchase them. The jury having found that one object of the transaction was to protect the goods from the demands of other creditors, it was held that the transaction was void under the statute. The effect of Gordon's assignment was to delay every creditor, which being so, the assignment was void. This point was decided in the late case of *Cochrane vs. Radanauth Dutt*, affirmed on appeal from a decision of Mr. Justice Jackson and Mr. Justice Norman. Throughout the whole of this transaction the plaintiff's conduct was marked with the grossest folly. It was clear he knew of Gordon's embarrassments, and he (the learned Counsel) would be able to prove that the plaintiff also knew of the decree which Grant, Smith & Co. had obtained against Gordon before the second advance was made. He submitted that if this was proved the Court could not uphold the assignment. The plaintiff's conduct reflected upon him in whichever light it was viewed. He was either an idiot or a schemer: the former if he did not make himself acquainted with the true state of affairs after the suspicious circumstances which he admits he knew; the latter, if he wilfully closed his eyes to what was going on around him.

Mr. Justice Wells said that *Martindale vs. Booth*, 3 B. and Ad. 505, was a leading case on the subject of fraud, and also *Hale vs. The Saloon Omnibus Company*, 28 L. J. Chan. 777, where the ruling in *Wood vs. Dixie* was upheld. These cases decided that suspicious circumstances would not vitiate a sale, supposing it was in all other respects *bond fide*.

Mr. Bell in reply said that those were cases of sale outright. The present was a mortgage where Gordon had tied up the property away from all his creditors. The case of *Holmes vs. Penney*, 3 K. and J. 91, decided that a settlement for valuable consideration made with the intention of defrauding creditors is void under the statute. The plaintiff had been guilty of more than folly; for by his

wilful blunders he had enabled another to commit a fraud. He had failed to show that he acted *bond fide*, and if he was privy to an act of Gordon's to delay his creditors, there could be no *bond fides*. (See *Holmes vs. Penney*, 3 K. and J. 90.) To entitle him to recover he must show *bond fides* as well as a valuable consideration before he could sustain this action.

Mr. Justice Wells said that the case of *Gale vs. Williamson*, 8 M. and W. 505, showed that valuable consideration may be proved to rebut fraud.

Mr. Bell said that case only decided that evidence of a valuable consideration was admissible to disprove the existence of fraud. As the plaintiffs had failed to prove an absence of fraud in Gordon, or that he himself had acted *bond fide* in advancing the money, he submitted that the deed should be set aside as fraudulent against creditors; but in the event of the Court not coming to that conclusion he suggested that the property should be directed to be sold by the Sheriff, the plaintiff be re-paid the sum he had advanced, and that whatever balance remained should be paid over to the defendants, Grant, Smith & Co.

Mr. Wilkinson for the Sheriff submitted the rights of the respective parties to the judgment of the Court.

Mr. George Henry Taylor, Mr. Gordon's assistant manager, was called by Mr. Bell to show that the plaintiff knew the nature of Gordon's position between the 16th and 24th of March.

Mr. Woodroffe in reply said that a distinction should be drawn between the acts of Gordon and those of the plaintiff. He should not apply himself to the consideration of the Statutes of Bankruptcy or Insolvency, as all the law affecting the present case was to be found in *Twyne's case*, 1 Smith's Leading Cases, p. 1. This was a mortgage, and not a sale; and the property, the subject-matter of the assignment, was more than sufficient to satisfy the mortgage, and leave something over for creditors. It could not therefore be said that Gordon had tied up all his property. The true answer to be given to the question of *bond fides* was, whether it was the intention of the parties to effect a sale. The case of *Hale vs. The Omnibus Company* and *Wood vs. Dixie* were authorities in point. It appeared there was nothing here to lead to a belief that Gordon, at the time of the transaction, intended to defeat his creditors. On the contrary, he intended to benefit them by paying off a seizure, and thereby to enable him to carry on his business. The question was, whether there

was any fraud between Gordon and the plaintiff. Almost the whole of the money was paid to creditors. Gordon received an equivalent for his goods. In the case of *Graham vs. Chapman*, I. R. and M. 453, where a trader, in consideration of a past debt and a present advance, conveyed by deed substantially the whole of his property, giving the transferee a right to seize all future acquired property, it was held that as the trader got no equivalent for any part of the stock transferred, such a transfer necessarily defeated and delayed his creditors, though without fraud, and was therefore void. Here there was an undoubted equivalent. It had been argued that there was only a sham possession. On this point the case of *Martindale vs. Booth* is a clear authority. Beyond all question the money was advanced, and this threw much light upon the transaction in judging of its *bona fide* nature. No doubt Tarracknauth Paulit might not have proceeded with the utmost care, but was he bound to enquire any further than he did? He did what a prudent man would do: he enquired whether the property was sufficient to secure his advance. It was argued that the deed was void because it tended to defraud a class of creditors. He submitted it did not. The cases cited by Mr. Bell—viz., *Graham vs. Furber* and *Bott vs. Smith*—did not apply. If the present case be compared with that of *Hale vs. The Saloon Omnibus Company*, it would be found to be much the strongest of the two. Here was an enquiry respecting Gordon's indebtedness, and a list of debts was shown to the plaintiff, which was no doubt intended by Gordon to represent the true state of his affairs. The case of *Holmes vs. Penney* went no further than that there must be both a good consideration and *bona fides*. There was not sufficient evidence of fraud even to affect Gordon; but admitting that his acts were tinged with fraud, the plaintiff ought not to be affected thereby. With respect to the Sheriff, he submitted that upon notice of the assignment, and when he found the plaintiff in possession, he was not justified in seizing. The case came under the 3rd section of Act VI. of 1855. He ought rather to have sold, but at any rate he was a wrongdoer in seizing. Upon the whole, he contended that the plaintiff had made out his case, and was, therefore, entitled to a verdict on all the issues.

Mr. Justice Wells:—In this suit the plaintiff claims to be entitled to the premises, stock-in-trade, furniture, goods, chattels, and effects mentioned in the plaint under a deed of assignment from Thomas Roxburgh Gordon, now an insolvent, but who at the date of assignment was carrying on business as a ship-chandler; and he also seeks to have the Sheriff restrained from selling the said

property seized by him in execution of a decree obtained by the defendants William Grant, John Brown, and James Steel in their suit against Gordon ; and to have the attachment removed.

The following facts are stated by the plaintiff in his written statement. On the 16th of March last the plaintiff became banian to Gordon in his business of a ship-chandler, and advanced to him Rs. 9,000 in Government currency notes. Of this sum Rs. 6,000 were paid to the Sheriff in satisfaction of a writ of execution against the property of Gordon in a suit brought against him by his former banian, Utoolchunder Mookerjee; Rs. 2,075 were paid to Mr. Goodall, an attorney of this Court, in satisfaction of a due draft drawn by him and accepted by Gordon ; and the balance, Rs. 925, was retained by Gordon for his own use. In consideration of the advance so made, Gordon wrote the following letter, under which the plaintiff took possession of the estate and effects therein mentioned :

"To BABOO TARRACKNAUTH PAULIT.

"In consideration of your having this day advanced me the sum of Rs. 9,000 on my promissory note payable on demand, I do hereby authorize you to take charge of all my stock-in-trade now in my store-house, No. 10-3 Strand, as security for the repayment of the said sum of Rs. 9,000, with interest at the rate of 12 per cent. per annum.

Yours obediently,

T. R. GORDON."

"16th March 1863.

On the 21st of March, Grant, Smith and Company obtained a decree against Gordon for the sum of Rs. 21,074-8-6. On the 24th of March the plaintiff, being unaware that any such decree had been obtained, advanced to Gordon a further sum of Rs. 11,000, also in Government currency notes, repayment of which advance, as well as of the former advance, with interest on both advances at 12 per cent., was secured by an indenture of assignment bearing the last-mentioned date, whereby Gordon assigned and delivered all and singular the good-will-in-trade, furniture, goods, chattels, effects, outstandings, and premises whatsoever then belonging to, or which should thereafter belong to him, of and in the trade and business of ship-chandler, and his right and interest of and in the lease of the premises wherein the said trade and business was then being carried on; and all other trade and business which he should thereafter carry on, and the

gains, profits, and credits thenceforth to arise from such business; and of all office and ship furniture, account-books, stationery, documents, bills, notes, vouchers, receipts; and all other property, credits, effects and gains then belonging or thereafter to belong to the said business; and all outstandings, credits, sum and sums of money then due and owing to the said business by any person or persons whomsoever; and all securities for the same to the plaintiff. On the 25th of March Gordon handed back the whole amount of the last advance to the plaintiff as banian, who paid away the same, *plus* Rs. 187 and 5 annas, for and on account of Gordon to the creditors mentioned in the list set out in the plaintiff's written statement. On the 13th of April, Grant, Smith & Co. took out an attachment in execution of their decree, under which attachment the Sheriff on the following day seized the property comprised in the assignment to the plaintiff.

The written statements of the Sheriff and of Grant, Smith & Co., though put in separately, must be treated as one document, as they are not only in substance the same, but are also verified by the same person—*viz.*, Mr. Steel, of the firm of Grant, Smith and Co. It appears from these statements that Grant, Smith & Co. filed their plaint against Gordon on the 28th of February, obtained a decree on the 21st of March, and took out execution on the 13th of April, under which execution on the 14th of April Gordon's stock was seized; that on the last-mentioned date Messrs. Judge, Bonnerjee, and Smith addressed two letters to the Sheriff—one on behalf of the plaintiff, giving notice of the assignment to him, and the other on behalf of one D. S. Smith, giving notice of his claim to the property, subject to the assignment to the plaintiff; that on the 12th of May Messrs. Judge, Bonnerjee, and Smith again wrote to the Sheriff on behalf of Mr. Smith, asserting that, subject to the plaintiff's lien, the property belonged to their client, and not to Mr. Gordon; and that on the 15th of April the following advertisement appeared in the newspapers:

"Notice is hereby given that I have this day purchased the stock-in-trade and good-will of the trade and business of ship-chandler, &c., lately carried on by Messrs. T. R. Gordon & Co. at No. 10-3 Strand Road, and such business shall henceforth be carried on by me under the style and firm of W. Clifton & Co.

D. S. SMITH."

"13th April 1863.

Upon the facts disclosed by the plaint and the written statements, the following issues were framed :

1. Whether the property mentioned in the plaint was the property of the plaintiff at the time of the seizure thereof by the Sheriff in execution of the decree in the suit of Grant, Smith & Co. against Gordon.
2. Whether the assignment in the plaint mentioned is a valid assignment as against the creditors of Gordon.
3. Whether the Sheriff was justified in seizing the said property.
4. Whether the Sheriff ought to be restrained from selling the said property.

This is an important case, and if I entertained any doubt upon the question raised by the issues, I would take time to consider my judgment ; but as the case has lasted two days and a half, I have had an opportunity of considering it carefully, and have come to a clear conclusion upon the facts proved.

It appears from the evidence that the business of Gordon had been stopped in consequence of an execution in the suit of the former banian, Utoolchunder Kurmookar, in respect of a sum of Rs. 6,000, the balance then remaining due of a debt originally very large, but which had been reduced by payments to the amount mentioned. In order to obtain means to relieve the business from the execution, Gordon employed two brokers—Bhuggobunchunder Ghose and Hurrochunder Dey—to procure some person who would be willing to act as banian, and to advance Rs. 20,000. The brokers were unacquainted with the plaintiff ; but in consequence of some information they had received as to his being a man of means, and after having failed in several quarters, they applied to him through his manager or sircar, Sreenath Chatterjee ; and, tempted by the offer of Rs. 400 a month and 12 per cent. on advances, the plaintiff consented to be banian on the terms proposed. Previous to this, however, and pending negotiations, he consulted Baboo Isserchunder Chatterjee, an old friend of his late father and the banian to the house of Messrs Jardine, Skinner & Co., who, with the exception of cautioning him to be careful, left him to act very much according to his own judgment ; but the fact of his having sought advice is a circumstance to show that he was acting *bond fide*, and not intending a fraud. It appears that the plaintiff was Honorary Professor of Mathematics and Literature in the Calcutta College ; and it may seem strange that a person of his education

and intelligence should have been so easily entrapped ; but it is to be observed that he was only 21 years of age and had just left college, and that, though a scholar, he had never before engaged in business, and was utterly and, perhaps, absurdly ignorant of the ways of life ; and it is not improbable that he was influenced by the circumstance of his father having been a banian, as also by the fact that the business of a banian is not only respectable, but is also, as a general rule, lucrative, and has in many instances led to wealth and fortune. It cannot be denied that he acted indiscreetly, but unless it can be shown that he acted collusively, and with intent to aid Gordon in defrauding his creditors, he is entitled to be maintained in the assertion of the rights claimed by him under the assignment.

It is in evidence that up to the commencement of the negotiations Gordon was a stranger to the plaintiff, and had no claim upon him ; and if the plaintiff had been aware of Gordon's real position, is it likely that he would have consented to jeopardize the large sum of Rs. 20,000, and that, too, without any motive connected with his own personal benefit or advantage ? I believe the plaintiff was kept in ignorance of the actual state of affairs, and that he acted *bond fide* upon the representations made to him. On the 16th of March the letter of that date was written, and the sum of Rs. 9,000 was advanced to Gordon, and was afterwards disbursed by him in the manner mentioned in the plaintiff's written statement ; and on the 24th of March the further sum of Rs. 11,000 was advanced, making together Rs. 20,000. The whole of this sum was borrowed by the plaintiff from his aunt Ranee Woomasoondery Dossee, the widow of the late Maharajah Madubkissen Bahadoor, on a mortgage of property to which he is entitled, subject to the life-interest of his grandmother, Sreemutty Rausmoney Dossee. It is proved that the mortgage was a real *bond fide* mortgage, and that the money therein mentioned actually passed to the plaintiff, and was advanced by him to Gordon.

The letter of the 16th of March and the promissory note therein mentioned were superseded by the assignment of the 24th of March, which was made contemporaneously with the last advance and as security for the repayment of the full sum of Rs. 20,000, with interest at 12 per cent. and monthly allowances. The sum of Rs. 20,000 having been given for the assignment, it cannot be said that the assignment was not made for valuable consideration. Mr. Bell objected to the admissibility of the assignment as evidence, on the ground that it bears an insufficient stamp, although it bears a stamp of the value

of Rs. 60. The stamp for an assignment is the same stamp as for a bond ; and, according to article 12 of Schedule A to the Stamp Act, the proper stamp for a bond " for the payment, either absolutely or conditionally, of any *definite or certain sum of money*," if above Rs. 10,000 and not exceeding Rs. 20,000, is Rs. 60. It was contended, however, that a stamp of the value of Rs. 60 is not a proper stamp, inasmuch as the assignment is for Rs. 20,000, *plus* interest and monthly allowances. But interest and monthly allowances do not come within the words " definite or certain sum," and no provision is made by the Stamp Act for any indefinite or uncertain sum. Indeed, it would be difficult to say what would be a proper stamp for an instrument given to secure payment of an unascertained and unliquidated sum. It is true, as was pointed out, that the assignment provides for the payment of Rs. 50,000 as liquidated damages in case of breach of performance of the covenants therein contained ; but Rs. 50,000 is the penal sum, and can never be recovered as such under the assignment, and no document is ever stamped with reference to the penal sum therein mentioned. I am of opinion that the assignment bears a sufficient stamp, but if my determination on the point is not final under section 17 of the Stamp Act, it will be open to the defendants to raise the point on appeal.

The assignment having been admitted, it becomes necessary to enquire as to its validity. The evidence of the plaintiff is truthful and consistent, as his conduct throughout has been straightforward and honourable. It is true that in entering so readily into important business relations with a stranger, he has displayed a vast amount of ignorance as regards the practical business of life ; but his very ignorance may be pleaded in his favour ; for if, instead of being a student and a literary man, it had been proved that he had been a banian under his father, and had some knowledge of business, I should quite agree with Mr. Bell that his conduct in that case would have been stamped with that kind of folly which would have rendered it more than suspicious ; but as this was his first commercial transaction, and he had never before employed himself except in scientific and literary pursuits, I cannot doubt his honesty of purpose, or believe that he acted otherwise than *bond fide*. If he has acted improperly, it has been towards none but himself. He has sworn that he took possession of the property under the letter of the 16th of March ; that he was in possession on the date of the assignment, and continued in possession till dispossessed by the Sheriff, and that the business went on as before ; the employés being, in addition to the establishment existing at the time of the assignment, a durwan and a sircar to watch his interests, with power to the latter to act for him in his

absence; and he has stated that nothing went out without the permission either of himself or his durwan. He is corroborated as to his general evidence by Taylor, who was called on behalf of the defendants as their principal witness. Taylor was an assistant in the business when the plaintiff took charge, and was continued in his former position. He states that the fact of the assignment having been made was notorious; but with reference to the despatch of goods, he states that he did send out goods without the permission either of the plaintiff or the durwan, as he had formerly sent out goods without Gordon's permission. Upon this point there is a discrepancy between his evidence and that of the plaintiff; but the plaintiff has stated that he allowed Taylor for the first eight days to send out goods, only requiring him to enter them in a book. There was no doubt an understanding that Taylor should continue to act for the plaintiff as he had done for the former banian, and that he acted in conjunction with and under the superintendence of the plaintiff. He has admitted that he sent in all receipts to the plaintiff at the end of the month; so that whether he sent out goods on any occasion with or without the permission of the plaintiff it is clear that he acted as his agent, and rendered him what was virtually a monthly account of sales. Notwithstanding this slight conflict of testimony between the plaintiff and Taylor, I see no reason to doubt that there was complete possession on the part of the plaintiff under the assignment.

A list of property was given to the plaintiff by the brokers, and this list, though of little value in itself, is of considerable importance as showing that the plaintiff did not enter upon the transaction without being furnished with the means of judging as to the nature and sufficiency of the security offered. No such list would have been required or furnished if the assignment was not real and the intention of the plaintiff honest and *bond fide*.

The receipts and vouchers put in show how the money was disposed of, and corroborate the plaintiff's written statement and his evidence. With the exception of a sum under Rs. 1,000, which was appropriated by Gordon to his own use, the whole sum was paid away to *bond fide* creditors, and no preference was given except, perhaps, to bazar creditors, a larger number of whom appear to have been paid than creditors of any other class. But this fact is to a certain extent favourable to Gordon, as showing that his object was to keep up his credit in the bazar so as to be able to carry on his business; and this is consistent with the supposition that he took a sanguine view of his own position, and hoped to weather the storm, and realize in the future a more successful career than he had done in the past. But his conduct in not acquainting the plaintiff with the exact

state of his affairs is most reprehensible. He was careful to communicate to him no more than was just sufficient to mislead him, and in this Taylor appears to have acted in concert with him. And if this case had depended upon the *bond fides* of Gordon in reference to the plaintiff, the position of the plaintiff would have been very different from that which he now occupies. It is impossible not to feel that Gordon acted most improperly as regards the plaintiff, and recklessly as regards himself. If he had seriously considered the overwhelming nature of his difficulties, he must have seen that he was in a state of hopeless insolvency, and that it was due to his creditors that he should take immediate action with a view to give them the full benefit of all his available assets. His conduct was such as to deceive the plaintiff, who, therefore, has much more reason to complain than the other creditors.

The defendants, Grant, Smith & Co., commenced their action in February, shortly before the commencement of the negotiations entered into with the plaintiff, and while the action was still pending and before trial the plaintiff obtained possession under the letter of the 16th March, and was in possession when the deed of assignment was executed. It was suggested by Mr. Bell that the plaintiff was aware of the proceedings of Grant, Smith & Co. previous to the assignment. Gordon and Taylor can say no more than that they *think* they informed him; but the plaintiff is positive in his denial that they did so, and in his assertion that he was ignorant up to the moment, of seizure, of any decree having been obtained by Grant, Smith & Co.; and I am bound to accept his positive testimony in preference to the doubtful and unsatisfactory testimony opposed to his. Not knowing what was impending, he believed he had suddenly developed into a full-blown banian to a good concern on very liberal terms; but before he could fully realize the extent of his good fortune either as regards present advantages or future prospects, the Sheriff suddenly appeared upon the scene, and put in his execution. And this is followed by what I cannot but designate a disgraceful proceeding on the part of Gordon, who, determined to make something out of the wreck, sold for Rs. 1,000 the good-will of the business which had already been assigned to the plaintiff, and that, too, without the plaintiff's consent.

It was contended by Mr. Bell that the assignment is fraudulent and void as against creditors under the 13 of Eliz., cap. 5, sec. 6, which is as follows: "Provided also, and be it enacted by the authority aforesaid, that this Act and anything therein contained shall not extend to any estate, interest, or lands, tenement, hereditament, leases, rents, commissions, profits, goods, or chattels had, made,

conveyed, or assured, which estate or interest is or shall be upon good consideration and *bond fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance and assurance to them made any manner of notice or knowledge of such conveyance, fraud, or collusion as is aforesaid, anything before mentioned to the contrary notwithstanding." When it is attempted to invalidate a transfer of goods by showing it to fall within the provisions of 13 Eliz., cap. 5, a question arises proper for the consideration of a jury, who are to say whether the transaction was *bond fide* or a contrivance to defraud creditors. If the assignment was made to defraud creditors, the plaintiff was certainly not privy to any such design, as he was at the time unaware of the existence of any creditors besides those who were afterwards paid out of the money advanced by him; and as the assignment was made to him upon valuable consideration, it cannot be said that in taking the assignment he intended any fraud. Nor can any fraudulent purpose be attributed to Gordon, except it be towards the plaintiff; for out of the money which formed the consideration for the assignment he satisfied the execution which then existed upon the property, paid his attorney a debt which had been due; and, after reserving a small sum for his own use, he left it to the plaintiff, as banian, to pay out of the balance the creditors who might press most and knock loudest at the door. If Gordon believed that he was hopelessly insolvent, he ought not to have made the assignment to the plaintiff, but to the general body of creditors; but he has said that he believed that his position was far from desperate, and his conduct is certainly consistent with that view. Such a view, however, was erroneous and ought not to have been entertained, but it was both entertained and acted upon, and resulted in the assignment to the plaintiff. It was contended by Mr. Bell that the plaintiff in taking the assignment acted with such gross and wilful ignorance, if not intentional fraud, that he ought not to be favoured in preference to the other creditors; but he could only act upon the information he received, and he was not informed of the debt to Grant, Smith & Co. The sum advanced by him was sufficient to pay off all the debts of which he had been informed; and he believed, not unreasonably, that, as the only remaining creditor, he himself was fully secured by the assignment. The only information communicated to him was such as to mislead him and not to excite his suspicion.

Mr. Bell cited *Bott vs. Smith*, 21 Beav., p. 511, as an authority in support of his position, and contended that if the assignment was made by Gordon with a view to avoid his creditors, very slight evidence of fraud on the part of the

plaintiff would be required to bring this case within the principle laid down in *Bott vs. Smith*—viz., that a deed may be void as against creditors, though full consideration is given for it, if it be in such a form as to defeat the creditors, and be executed with that intention. But that case is not only distinguishable from the present with reference to the facts upon which it proceeds, but is opposed to *Wood vs. Dixie* (7 Q. B. 892) and *Hale vs. The Metropolitan Saloon Omnibus Company* (28 L. J. Chan. 777), the two leading cases on the subject; and I apprehend that no Court would act upon the authority of *Bott vs. Smith*, so far as it is inconsistent with either of these cases. It is a curious circumstance that *Wood vs. Dixie* was not mentioned when *Bott vs. Smith* was before the Court; nor was *Bott vs. Smith* mentioned when *Hale vs. The Metropolitan Saloon Omnibus Company* was before the Court.

In the note on Twyne's case the law is thus stated: "In cases where, although the conveyance is absolute, and the possession has not passed, there are surrounding circumstances which show that a fraud may not have been intended, it cannot properly be said that there is nothing but an absolute conveyance without the possession (*Latimer vs. Batson*, 4 B. & C. 652). It may be laid down that under almost any circumstances the question fraud or no fraud is one for the consideration of the jury. See the judgment in *Martindale vs. Booth* (3 B. & Ad. 498), where several cases establishing this point are cited. In Chancery there are no rules establishing particular circumstances to be indelible badges of fraud; but the question of *bona fides* is there also one of fact."

In *Graham vs. Furber* (14 Q. B. 410) A, a trader, being in difficulties, and having five executions against him, all his goods were conveyed to the defendant by bill of sale from the Sheriff, with an understanding that they should remain on A's premises to enable him to re-purchase them. The jury having found that the object of the transaction was not merely to relieve A from a forced sale of his goods, but also to protect them from the demands of other creditors, it was properly held that the transaction was void under the Statute 13 Eliz., cap. 5. That case, however, differs widely from the present; for there was the absence of *bona fides* on the part of both vendor and vendee, and the transfer was purely colourable and made to defeat other creditors; whereas in the present case it is proved that the assignment was real, and was made for good consideration in the shape of Rs. 20,000, the whole of which sum was actually advanced to the assignor, and was for the most part disbursed in payment of his debts and in furtherance of his views with reference to the carry-

ing on of his business. The case of *Holmes vs. Penney*, 3 Kay and Johnstone 91 also differs from the present case; for there the settlement, though for valuable consideration, was made with the *intention* of defrauding creditors; whereas in the present case the assignment was made without any such intention. The case of *Wood vs. Dixie*, 7 Q. B. 892, the principal case on the subject, comes nearest to the present case; and there it was held that a sale of property for good consideration is not, either at Common Law or under the Statute 13 Eliz., cap. 5, fraudulent and void merely because it is made with the intention to defeat the expected execution of a judgment-creditor. Mr. Bell very ingeniously endeavoured to draw a distinction between a sale and an assignment of property to secure an advance, with a view to show that that case is distinguishable from the present; but the facts in both cases are so similar that it is impossible to hold that this case does not fall within the principle of the other so as to be governed by it. The plaintiff in that case had lent money to one Phillips to relieve him from an execution at the suit of one Norton; and in October, Phillips, being unable to pay, executed a conveyance to the plaintiff of property to be taken at a valuation. The valuation was completed on 17th October, and afterwards on the same day the execution in another suit was put in. In the present case the plaintiff advanced money to relieve Gordon from an execution at the suit of the former banian, and to enable him to pay off some other debts and carry on his business, and Gordon, to secure the plaintiff, executed an assignment of his property three days before the execution was put in. In each case the transaction was not colourable, but real, and done for a valuable consideration; and the plaintiff was in actual and *bond fide* possession when the execution was put in. In *Gale vs. Williamson*, 8 M. & W. 405, a father by deed had assigned to his son, "in consideration of natural love and affection," his dwelling-house and all his personal estate; and it was held in an action by the son against the Sheriff, for levying on goods part of such estate, under a *fi-fa.* against the father, that it was competent to the plaintiff to prove that by a bond, bearing even date with the deed of assignment, he bound himself to maintain his father's wife and children, and that the jury having found that it was a part of the same transaction, and that the assignment was *bond fide*, it was not void against creditors under the Statute 13 Eliz., c. 5. The case of *Hale vs. The Metropolitan Saloon Omnibus Company*, 28 L. Chan. 777, recognizes *Wood vs. Dixie*, and is a strong case in favour of the plaintiff. In that case a tradesman, expecting the execution of a writ of *feri facias* issued by the Court of Chancery for payment of costs in a suit, effected a sale of the whole of his furniture and stock-in-

trade. The only document passing upon the occasion was a receipt for the money paid upon the purchase. A few days after the purchaser had taken possession, the writ was issued, and the Sheriff subsequently filed a bill of interpleader, upon which the question arose whether the sale was fraudulent and void ; and it was held that it was not a ground for vitiating a sale ; that it was made with a view to defeat an expectant execution ; that under the particular circumstances of this case there was no ground for saying that the purchase was not *bond fide*, and consequently the sale could not be set aside. In his judgment, *Kindersley, V. C.*, said : " Was the sale there valid or void at Common Law under the Statute of Elizabeth, the Company taking upon themselves the onus of proving that it was fraudulent ? At the present day, whatever fluctuations of opinion there may have been in the Courts of this country as to the construction of that statute, it is not a ground for vitiating a sale that it was made with a view to defeat an intended execution on the goods of the vendor, the subject of the sale, supposing it was in all other respects *bond fide*." The facts attending the transfer of the property in that case were so suspicious that the purchaser was ordered to pay his own costs ; but the facts attending the transfer of the property in the present case are entirely free from suspicion.

The result of the evidence is that the assignment was *bond fide* and for valuable consideration, and that the plaintiff was in possession and control of the goods under the assignment up to the time of the seizure ; and upon the facts proved I am clearly of opinion that the assignment is valid, and that the plaintiff is entitled to the possession of the property thereunder. I find all the issues for the plaintiff, who is entitled to a verdict with No. 2 costs.

As the plaintiff had a lien upon the property under the assignment, the attachment ought to have been by prohibitory order and not by a general attachment, and no actual seizure ought to have been made. See Act VI. of 1855, section 1, clause 3, and Act VIII. of 1859, section 234.

Under the circumstances I think the attachment as well as the order for sale ought to be set aside, and I order the same accordingly.

(Before the Hon'ble Mr. Justice Norman.)

REGINA v. RAMCOMUL MITTER.

Section 111 of Act I. of 1859 applies only to the Depositions of Merchant Seamen.

The Advocate-General and Mr. Hyde for the prosecution.

Mr. Doyne and Mr. Eglinton for the defence.

This was a case postponed from the previous Sessions in consequence of the departure of one of the most important witnesses, Mr. Grant, who had left Calcutta for Madras on account of ill-health. It now appeared that Mr. Grant, instead of stopping at Madras, had proceeded to England, and that there was no probability of his returning before the expiration of three months at the earliest. The Court refused a further postponement. The case was accordingly sent up to the Grand Jury, and a true bill returned.

Mr. Advocate-General, on behalf of the prosecution, now tendered in evidence the deposition of Mr. Grant taken at the Police, which, he contended, was admissible under section 111 Act I. of 1859.

Mr. Doyne for the defence argued that the section of the Act upon which the learned Counsel for the prosecution relied had not the general application which it was now sought to give it. The Act was, as its title stated, "An Act to amend the Law relating to Merchant Seamen." The section in question had reference to merchant seamen exclusively, and to evidence only as bearing upon the subject-matter of the Act.

Mr. Justice Norman said he was of opinion that the section in question related to the depositions of merchant seamen only. The Legislature in making the provision contained in section 111 plainly had regard to those cases in which merchant seamen could not remain in port. Such interference was natural enough, but it was most unlikely that the Legislature should insert the general provision contended for in so special an Act. A case had been referred to by the Advocate-General which was tried by Mr. Justice Morgan. It was the case of Demonath Sen, who was charged with receiving stolen property. The deposition of one A. G. Thompson taken at the Police was in that case received as evidence, but that person was a seaman; so that the case did not support the view upheld by the learned Advocate-General. The Court was fully satisfied that the deposition was inadmissible, and must therefore reject it.

(Before the Hon'ble Mr. Justice Morgan.)

IN RE GODBY.

A military testament valid in its inception may be deprived of its privileges by lapse of time.

This was an application for probate of the will of one Captain Godby, who died at Lahore of cholera about a year ago. The will was made at Lucknow in the presence of the enemy during the mutiny of 1858. It ran as follows :

"I, Robert F. Godby, Lieut., 35th Bengal Native Light Infantry, and Adjutant of the 1st Sikh Irregular Cavalry, hereby make my will, which I beg may be strictly attended to.

"I leave what little money and property I am possessed of to my brother Christopher James Godby, Lieutenant of the 35th Native Infantry and Second-in-Command of the Corps of Guides, to be disposed of as he thinks best ; and I desire that none of my effects be disposed of without his being first consulted.

"I wish that none of my clothes may be sold by auction, but that they may be all burnt.

"My watch, sword, and Bible I wish sent to my mother.

(Sd) R. F. GODBY,

35th Light Infantry.

Lucknow, April 18th, 1858."

Mr. Woodroffe in support of the application contended that the will was good under the 29th section of the Wills Act (Act XXV., 1838). No one could deny that being at Lucknow in April 1858 was being "on an expedition," within which definition the words of the Wills Act have been construed to come (*Drummond vs. Parish*, 3 Curteis, p. 542). In the case of *Herbert vs. Herbert*, 1 Deane, p. 11, the application was granted ; and that case was not so strong as the present one. The case of *Admiral Austin*, 2 Robinson, p. 611, was important in one respect, namely, as shewing that the Court looks to the position of the party at the time of making the will, and does not seem to adopt the rule of the civil law as to depriving a soldier of the privilege after one year's residence in quiet quarters. It was quite sufficient therefore that the will should be good in its inception, which was certainly the case in the present instance.

Mr. Justice Morgan said that he had looked into the authorities cited, and was of opinion that the writing could not be admitted to probate. The privileges granted to military testaments under our law had been borrowed from the Roman law, and under that law it seemed that a military testament, valid by reason of its being made on an expedition, remained in force for one year only after the soldier returned home or arrived at a place where there was a Consul or other authorized person before whom a valid will might be made.

Applying this principle, for he had not been able to find any decision, he refused probate to this testamentary writing, which, although doubtless valid had the writer died in the expedition upon which he was engaged, must, having regard to the date of his death, in time of peace and several years after its making, be deprived of its privileges as a military testament.

(*Before the Hon'ble Mr. Justice Levinge.*)

G. HANLON *vs.* THE INDIA BRANCH RAILWAY COMPANY.

For the purposes of summons a Railway Company must be deemed to dwell at its principal office.

Mr. Newmarch for the plaintiff.

Mr. Lowe for the defendants.

Mr. Lowe objected to this case being heard, on the ground that no sufficient service of the summons had been effected. The only person upon whom service had been made was Mr. Sharpe, Executive Engineer of the Company. That gentleman had no right, power, or authority to receive process; to appear in suits, or to instruct any one to appear on behalf of the Company. Mr. Wilson, the Agent and Manager of the Company, was at present at Simla, and no communication had been made to him. By sec. 63, Act VIII., 1859, it was provided that "when a suit is against a Corporation or Company authorized to sue or be sued in the name of an officer or trustees, the summons may be served by leaving the same at the *registered* office, if any, of the Company, or by giving it to any Director, Secretary, or other principal officer of the Corporation or Company." In this case there was no *registered* office, and the Directors and Secretary were in England. The only person who could give instructions to defend the action was Mr. Wilson, who was now at Simla.

Mr. Newmarch, on behalf of the plaintiff, relied upon the cases of *Brett vs. Montaux* (1 Kay and Johnstone, p. 98) and *Carron and Company vs. McLaren* referred to in Haddon's Limited Liability Act, p. 7.

Mr. Justice Levinge said that the service of the summons in this case was evidently insufficient. It was perfectly clear that Mr. Sharpe had no authority to act. It was also clear that the defendants had no registered office within the jurisdiction of this Court. Neither the Directors nor the Secretary of the Company were resident in India. Mr. Wilson was the General Agent and Manager of the Company, and the only representative in India who had authority to bind the defendants, or who could be sued in India in their names. It could not, however, be expected that the plaintiff would go running after Mr. Wilson to Simla. Not only would great trouble be incurred, but considerable delay would be entailed thereby. In the case of *Adams vs. Great Western Railway Company*, 30 L. J. Exch., p. 124, it was ruled (1) "that a body corporate may dwell," and (2) "that a Railway Company must be deemed to dwell at the *principal office*, and not at every station on the *line*." In this case the defendants' principal office was at Nullhatte near Moorshedabad, and the terminus of the line was at that place. Under these circumstances the defendants must be held to dwell at Nullhattee. A new summons must therefore be taken out and served at that place.

(Before Mr. Justice Morgan.)

HADJEE JOOSOOP AND OTHERS *vs.* VARDON AND OTHERS.

Where a Policy has been effected on a gross quantity of sugar, the fact that that sugar has been described in the margin of the Policy as being in different lots, containing different species of sugar, and being separately priced does not raise any presumption that a separate Insurance upon each separate species of sugar was intended by the Policy-holder.

This was an action upon a policy of insurance.

Mr. Doyne appeared for the plaintiffs.

Mr. Bell and *Mr. Newmarch* for defendants.

Mr. Justice Morgan delivered the following judgment, which exhibits all the facts of the case :

The plaintiffs insured in the defendants' office, called "The Amicable Insurance Office," 1,179 bags of sugar shipped by the agent of the plaintiffs on board the *Turon*, which vessel was afterwards lost on the Fultah Sands; and they bring this suit to recover on the policy of insurance in respect of the total loss of 944 of the bags shipped. The material clause in the policy (which was upon goods and merchandizes) is in the following words:

"The said goods and merchandizes laden thereon for so much as concerns the assured, by agreement between the assured and Company in this policy, are and shall be rated and valued at Company's Rupees eight thousand, two hundred and twenty, declared to be on part-value of 1,179 bags sugar as per particulars in the margin. Warranted free of particular average, anything herein contained to the contrary notwithstanding." And the particulars given in the margin are—

HMJ 500 bags Baloo Kall sugar @ 30 per bag	...	Rs. 15,000
„ 250 bags Cossipore Kall sugar @ 40 per bag	...	„ 10,000
„ 235 bags Baloo Kall sugar @ 40 per bag	...	„ 9,400
„ 194 bags Baloo Kall sugar @ 30 per bag	...	„ 5,820
D		
1,179 bags sugar	Co.'s Rs. 40,220

The sugar of the four lots thus separately mentioned differed each from the other in quality, in price, and in the size of the packages; and the several lots were separately bought by the plaintiffs' agent from different vendors. The first, second, and fourth lots were wholly lost; out of the 235 bags composing the third lot, 157 bags were recovered uninjured. The plaintiffs make no claim against the insurers on account of any portion of the third lot, but they contend that they are entitled, under the terms of the policy, to recover as for a total loss of the remainder of the sugar.

In *Ralli vs. Janson*, 6 El. and Bl. 422, the Court of Exchequer Chamber decided that the ordinary memorandum (corresponding with the warranty in this policy) "exempts the Underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and although such packages be entirely destroyed or otherwise lost by the specified perils." This is the rule where the goods shipped are of the same species, and

are not expressed by distinct valuation, or otherwise, in the policy to be separately insured. The judgment proceeds: "As to their (the Underwriters') liability in respect of different species we need not express any opinion." Two later cases were cited to show that where different species are a subject of insurance, then insurance is to be distributively taken as a separate insurance of each. In *Duff vs. Mackenzie*, 3 C. B. (N. S.), p. 16, the master of the ship who had insured £100 "on master's effects warranted free from all average," and who had, at the risk of his life, succeeded in saving his chronometer and certain other things, was allowed to recover as for a total loss in respect of that portion of his effects (of the value of £67-10) which was burnt with the ship. In *Wilkinson vs. Hyde*, 3 C. B. (N. S.), p. 30, the insurance was "upon any kind of goods and merchandizes," and the property shipped was an emigrant's equipment, consisting of a variety of tools, materials, &c., in several separate packages; some packages were wholly lost. The Court held that plaintiff was (notwithstanding the warranty) entitled to recover as for a total loss of these packages.

In both these cases the subjects of insurance were several separate articles wholly distinct in their nature. In *Entwistle vs. Ellis*, 2 Hurl. and Nor. 549, the insurance was on rice. The decision went upon other grounds, but the case was cited for the remarks of some of the learned Judges as to the probable intention of a shipper of rice of different descriptions, in the case there supposed, to make a distinction and have a separate risk for each sort.

In the present case there is not, I think, any such difference of species or such indication of the intention of these contracting parties as to lead to the conclusion that this policy should be construed as a separate insurance of each lot, rendering the Underwriters liable for a total loss of any one. There is certainly some difference in the quality of the sugar, and every lot (and every bag therein) is separately valued; but the language of this policy in the clause above quoted seems to me clearly to show that the parties have contracted for one insurance of the whole, and not for several insurances of each of the four portions, and that the Underwriters are exempt by the warranty from all liability, except in the case of a total loss. The insurance is for Rupees 8,220 on a part of the value of the whole shipment of 1,179 bags. In the margin the 1,179 bags are stated to be worth Rs. 40,220, and the value of each bag, and of each of the four lots forming the entire shipment, is given to show the process by which the sum total is calculated. Such an enumeration and valuation of

the goods is not, I think, sufficient to control the language of the policy which speaks only of the entire quantity, and warrants the whole as one bulk "free of particular average, anything herein contained to the contrary notwithstanding."

There must be a decree for the defendants with costs.

Decreed accordingly.

(Before the Hon'ble Mr. Justice Levinge, Commissioner.

In re THOMAS ROXBOROUGH GORDON.

Insolvency—Furniture separate property of the wife—Valid disposition of stock-in-trade on the eve of bankruptcy—Undue preference—Debts fraudulently contracted—Petition dismissed.

Mr. Wilkinson for the insolvent.

Mr. Lowe for Messrs. Grant, Smith and Co., Messrs. Harton and Co., and Mr. Caleb Ladd, of the Ice House, opposing creditors.

Mr. Coryton for Miss Scotney.

Mr. Cowell for the Official Assignee.

Mr. Commissioner Levinge:—Thomas Roxborough Gordon the insolvent, lately carrying on business as ship-chandler and trader in this city, filed his schedule on the 12th of May last. That schedule discloses debts amounting to Rs. 191,730, Rs. 70,000 of which are, however, secured by mortgage. The original assets, as shewn by the estate paper, consist of two houses; these are mortgaged to their full value. The debts said to be due to the insolvent would appear to be worthless. The only property traceable to the insolvent since the filing of his petition consists of some articles of furniture as a piano and the like, which the insolvent has sworn belonged to his wife; and as there is no evidence to contradict this statement, I must rule that these articles do not pass to the Official Assignee. It has been ruled that furniture the separate property of the wife does not pass to the Assignees under a *fiat* against the husband (*Shelford*, 3rd Ed., p. 389).

The petition came on for hearing on Saturday, the 1st of August last, when it was found that the insolvent was either unwilling or unable to make a full disclosure of his affairs, and what had become of the goods supplied to him by his scheduled creditors, his stock-in-trade, and the proceeds from June 1860 to March 1863. Failing to obtain satisfactory evidence upon which to adjudicate, a fact attributed by the insolvent to his own carelessness and neglect in not keeping regular account-books, it was hoped that by affording him a month's time, with protection, he would be prepared to make a full and true disclosure to the Court, and render a strict account, for the information and satisfaction of his creditors. When the examination was renewed on the 29th ultimo, the insolvent failed to improve his position; and although the Court and Counsel for the opposing creditors laboured to obtain a full statement of his affairs, the result has been that at the close of the hearing he has completely failed to give a debtor and creditor-account of all his dealings between June 1860 and March 1863, or to show what has become of his stock-in-trade and the proceeds of his dealings within that period, and the position he was in at the time each debt was contracted.

It appears that the insolvent left the establishment of Messrs. Harton and Co., in this city, in June 1860, and set up in his late business. At that date, according to his evidence, he commenced to trade with a capital of about Rs. 30,000, having received Rs. 15,000 on the 1st of June from Messrs. Harton and Co.; the remainder he alleged belonged to his wife. He also obtained from Messrs. Harton and Co. Rs. 3,000 worth of goods, but for which they have not been paid. The insolvent was possessed of two houses. These, according to his evidence, he mortgaged about six months after he commenced business for Rs. 60,000; the proceeds, he says, he brought into his business. He also subsequently raised Rs. 10,000 by a further charge on the said property. The result of his trading has been to inflict serious losses on his creditors, who are now left without any security to meet their demands. They have not even the satisfaction of knowing what has become of the proceeds of the goods they supplied him with to carry on his business. The insolvent does not even show the sources of his alleged losses. He only pointedly refers to the failure of one contract made to supply the troop-ship *Walmer Castle* with goods in April 1862. The amount of the contract was for Rs. 60,000; the actual amount expended by the insolvent on the goods was Rs. 50,000. The whole of this latter sum has not been forfeited; how much has been forfeited it is impossible to obtain accurately from the insolvent.

It appears the Messrs. Grant, Smith and Co. were creditors to a large amount, and having put their claim into the hands of Mr. Abbott, an action was instituted, and a decree obtained, in the High Court against the insolvent on the 21st March last for Rs. 21,500. At this time Mr. Abbott pressed the insolvent for a settlement, but was put off with the assurance that Grant, Smith & Co.'s demand would be at once settled. He said he was raising money to do so; yet we find on the 16th March he had raised Rs. 9,000 from Tarracknath Paulit on the security of the whole of his stock-in-trade, and on the 24th March following he completed his insolvency by conveying to Tarracknath Paulit his stock-in-trade and every thing he ostensibly possessed for the sum of Rs. 20,000. This sum included the prior advance of Rs. 9,000. Messrs. Grant, Smith & Co. were not paid, and on the 13th of April they took out execution, and on the day following the goods and premises assigned to Tarracknath Paulit were seized by the Sheriff. Grant, Smith & Co. were met by Tarracknath Paulit's claim, and immediate litigation was the result. A suit was instituted in the High Court by the latter, and heard and determined by Mr. Justice Wells; and in that suit the validity of the insolvent's assignment by way of mortgage was established, it having been held that Tarracknath Paulit had *bona fide* advanced the Rs. 20,000, and that there had been no fraud whatsoever on his part. The insolvent filed his schedule in this Court, as before stated, on the 12th of May last, or within two months from the date of the assignment.

The Court has to consider if this deed can be set aside under the provisions of the 24th section of the Insolvent Act, 11 Vic., c. 21. That section provides that if any insolvent who shall have filed his petition for his discharge under the Act shall voluntarily convey, assign, deliver, or make over any real or personal estate, property, goods, or effects to any creditor, every such conveyance, assignment, delivery or making over, if made within two months before the date of the petition of such insolvent, is thereby declared to be fraudulent and null and void as against the assignees of such insolvent.

I do not consider Tarracknath Paulit stood in the position of a creditor within the meaning of that section. Holding that opinion, and passing on to the construction to be given to the words "voluntarily convey, deliver, or make over," I cannot declare the conveyance void under the Insolvent Act. It is clear from the evidence adduced on the first hearing of this petition, as well as from the report of the case tried in the High Court, reported in 1

Hyde's Reports, p. 194, that Tarracknath Paulit was in undoubted possession and control of the goods under the assignment up to the time of the seizure, and that his possession has continued to the present time. It is true that the stock-in-trade when mortgaged remained on the same premises, but Tarracknath Paulit took possession of it, and appointed a sircar to superintend the business. The stock-in-trade therefore cannot be held to have been in the possession of the insolvent, at the time of the filing of the petition, with the consent and permission of the true owner. Had there been such possession, it would have vested the stock-in-trade in the Official Assignee, under the 23rd section of the Act, for the benefit of the creditors, notwithstanding the assignment; the policy of the law being to prevent fictitious credit by an appearance of wealth; but it is clear that, in order to have vested the effects so mortgaged in the Official Assignee, the possession of the insolvent must not only be proved, but that possession must be shown to have been with the consent of the true owner, *viz.*, Tarracknath Paulit. (See *Freshney and Wells*, 26th L. J. Ex. 129.) The assignment therefore, although made on the eve of bankruptcy, was a valid disposition of the stock-in-trade, which thereby became wholly lost to all the scheduled creditors.

One of the grounds of opposition by Messrs. Grant, Smith and Co. was that the insolvent, by the transaction with Tarracknath Paulit, committed a breach of the fiftieth section of the Insolvent Act, inasmuch as he was guilty of undue preference in assigning away his whole property at the time he was so deeply and hopelessly involved; but it will be observed, on reference to that section, that the undue preference must be given to a creditor in order to support a breach of the Act; therefore, the transaction with Tarracknath Paulit, who did not stand in that position to the insolvent, was not an undue preference. But I consider on the evidence that the insolvent was guilty of undue preference on other grounds.

It has been proved that with the exception of a sum of Rupees 1,000, which was applied by the insolvent to his own use, the whole sum raised by the mortgage was paid away to certain preferred creditors. This was fraud on those who were passed over, and particularly on the judgment-creditors Grant, Smith and Co., who had been prevented acting on their judgment by the insolvent's promises. Had the insolvent acted properly, he should have called a meeting of his creditors, or taken some steps to wind up his affairs under the Insolvent Act, by which means his available assets would have been vested

in the Official Assignee for the benefit of the creditors at large; instead of acting thus, however, the insolvent defeats the object of the Act by conveying away his stock-in-trade on the eve of filing his petition. Judging from the Insolvent Act, it is clear that he was on the 24th of March last a ruined trader. In this opinion I am fortified by the following passage from the judgment of Mr. Justice Wells, before referred to: "If he (the insolvent) had seriously considered the overwhelming nature of his difficulties, he must have seen that he was in a state of hopeless insolvency, and that it was due to his creditors that he should take immediate action with a view to give them the full benefit of all his available assets. That was his bounden duty." Instead of doing so, he defeats his creditors at large and the objects of the Act under which he now seeks the aid of the Court. The insolvent law views undue preference as a highly criminal act, and leaves to the Court a discretionary power of punishing an insolvent guilty of that act with imprisonment for a term not exceeding two years.

I consider, on the score of unsatisfactory accounts and answering, as well as on the score of defeating creditors and the objects of the Act, I have shewn sufficient grounds for exercising my discretion by adjourning this matter *sine die*, or dismissing the petition; but I am compelled, owing to the opposition by Mr. Ladd, a merchant of this city, who is a creditor for Rs. 925, represented by Mr. Lowe as his Counsel, and by the opposition on behalf of Miss Scotney, a creditor for Rs. 10,000, represented by Mr. Coryton as her Counsel, to enter into a further consideration of the insolvent's conduct.

Mr. Ladd opposes, alleging that his debt was contracted fraudulently. He has been examined on oath, and has stated that he supplied butter to the value of Rs. 925 to the insolvent on the 22nd January last. That the insolvent called on him on that day and asked if he had butter for sale. Mr. Ladd assented, but said that his terms were cash. The insolvent said he had a cheque for Rs. 7,000 with him. This transaction occurred in the afternoon after bank hours. The insolvent promised to pay him when he could get his cheque cashed. The butter was supplied on this distinct contract, but has never been paid for. The insolvent flatly contradicts this version of what occurred at the interview. He swears he never promised to pay cash for the butter, and that he considered it was not a cash transaction. He also denies that he had a cheque for Rs. 7,000, but says he had a note for Rs. 1,000; and admits that he might have told Mr. Ladd that he would get the note cashed the next day and pay him. I cannot accept the insolvent's version of this transaction

in opposition to the distinct evidence of Mr. Ladd, inasmuch as the insolvent's statement that it was not a cash transaction is quite inconsistent with his statement that he might have said that he would pay him next day. Moreover, if it had been a bank note that the insolvent had with him, there would have been no difficulty in cashing it, seeing that all he would have to receive back would have been the trifling sum of Rs. 75. The insolvent has said he was obliged to get the butter that very day, and send it on board a ship to complete a contract, which would otherwise have been forfeited. Mr. Ladd endeavoured to obtain payment, and failed; and four days after the transaction the Sheriff's officers were in possession of the insolvent's property. I am reluctantly obliged to come to the conclusion that the insolvent has not told the truth, and has been guilty of a fraud upon Mr. Ladd within the meaning of the 51st section of the Act.

Miss Scotney opposes the discharge of the insolvent on the ground that he obtained Rs. 10,000 advance, by way of mortgage upon his household property, under a false pretence. It has been stated that the insolvent's houses had been mortgaged for Rs. 60,000—Rs. 30,000 to Miss Scotney, and Rs. 30,000 to Mr. Goodall, the insolvent's attorney. These two loans were paid off, and a fresh mortgage executed to Mirza Abdool Kurreem for Rs. 60,000, dated the 21st June 1862. The insolvent a few days after wrote to Mr. Hills, who had a power-of-attorney for Miss Scotney, asking for the advance of Rs. 10,000 on mortgage. Mr. Beeby was the attorney acting for Mr. Hills. Mr. Hills writes to the insolvent requiring information as to the amount lent on the two houses; and by letter dated the 5th July 1862, being eleven days after the insolvent had executed the mortgage for Rs. 60,000, he writes the following reply: "The two houses are both mortgaged for one year at Rs. 50,000." Acting on the faith of this written and unequivocal statement, it appears that Mr. Hills consented to advance the Rs. 10,000, knowing from the previous loan that the property was security for about Rs. 60,000. Mr. Beeby required a description of the houses to complete the deed, and applied on the 18th July 1862 to the insolvent to furnish the requisite information. The insolvent stated that he went on that day to Mr. Goodall's office, and procured the necessary details in writing. On the 19th, being the day following, he returned to Mr. Beeby's office, and left the required document. The paper left with Mr. Beeby has been produced by that gentleman in Court. The insolvent will not undertake to identify it, but will not pledge his oath that it is not the paper he left with Mr. Beeby. This paper contains a description of the houses, and has

added to the foot the following entry in the same handwriting: "The above description is at present mortgaged for Rs. 50,000 for twelve months to Mizra Abdool Kurreem." Relying on this document and the previous representation in the insolvent's own handwriting, Mr. Beeby prepared the mortgage, which contains a recital that only Rs. 50,000 is advanced on faith of the mortgage, and the deed is signed by the insolvent with this representation on the face of it.

Independent of the distinct untruth contained in the written representation of the insolvent, the following very suspicious circumstance has remained unexplained. The promise to get the information for Mr. Beeby from Mr. Goodall was never carried out, but a paper is produced by the insolvent to Mr. Beeby as if coming from the office of Mr. Goodall, but which Mr. Goodall has sworn is not in the handwriting of any of his clerks; and the description of the houses contained in the paper does not correspond with the description contained in the deeds in Mr. Goodall's possession. I can come to no other conclusion than that the insolvent obtained this loan on false pretences, having represented as an existing fact that only Rs. 50,000 had been advanced, when, in fact, he well knew that Rs. 60,000 had been advanced. I therefore consider that fraud has also in this instance been established.

In conclusion I regret exceedingly, for the sake of the insolvent and his family, that I am constrained, having a due regard to the interests of justice, to dismiss his petition. I know well that such an order is one that affects him vitally, as it does not release him from the demands of his creditors. Were there any assets in the hands of the Official Assignee, I might have adjourned his case for some lengthened period, but no evidence has been adduced to show that the Official Assignee is likely ever to obtain a single rupee under this petition. To permit a trader who has, according to my judgment, defrauded some of his creditors; who has kept no regular accounts in his trade; who will not make a full, perfect, and true disclosure of his dealings to be discharged from all liabilities to his creditors, would be to hold out an inducement to dishonesty, and practically to defeat the Bankrupt Law—a law which the insolvent has voluntarily evoked in his aid, but which he has defeated by his own act. It has been truly said by *Lord Justice Turner*, 30 L. J., p. 37, *Cases in Bankruptcy*, that the Bankrupt Court should not generally deal severely with cases of mere imprudence or extravagancy, but should set its face most resolutely against every description of fraud or false representation.

Fair, honest, and straightforward dealing is expected from every man in the ordinary transactions of life; but it is beyond measure important that it should be observed, and the observance of it, enforced, in all the transactions of trade for the credit of our merchants and traders. I therefore cannot consent to put the insolvent in a position to again embark in trade—to confer on him what has been termed a “Free Pass” to enter into the world of commerce, or afford him legal protection. He must owe complete immunity to the indulgence and forbearance of his creditors, and not to the protection of the law, which I regret I cannot extend to him.

Petition dismissed accordingly.

(Before the Hon'ble Mr. Justice Norman.)

PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY

vs.

THE SHIP “FORT GEORGE.”

Measure of Remuneration for Salvage Services.

The *Advocate-General, Mr. Bell, and Mr. Lowe* for the promovents. *Mr. Doyne and Mr. Paul* for the impugnants.

Mr. Justice Norman :—This is a suit for salvage by the owners, the captain, and the crew of the “Colombo” (one of the steam-ships of the Peninsular and Oriental Steam Ship Company having engines of 450 horse-power, and being of 1,103 tons burden if measured as a steam-ship, or 2,200 if measured as a ship) against the “Fort George.” The salvors claim Rupees 60,000.

On the 8th of October last, as the “Colombo” was proceeding up the Bay of Bengal on her voyage from Suez to Calcutta, in longitude 16-30 north and 83-23 west, about 11 o'clock A. M. the officer of the watch perceived what he thought was a fleet of boats due north of the “Colombo.” The Captain ordered the course of the “Colombo” to be changed, knowing, as he said, “that boats could not be out in that position.” Had he continued his course, he would have passed about 8 miles to the eastward of the object in question. On nearing it he perceived it to be a ship totally dismasted—the “Fort George,” a vessel bound to Calcutta, of 732 tons burden. He sent the Chief Officer on board. The bowsprit was gone and had torn away the bulwarks about the bows. The “Fort George” had two small spars rigged—one forward, and the other on the stump of the mizen mast. The Chief Officer said he never saw a ship in a worse condition as regards rigging. All her boats were gone except the long-boat which was on

deck. The Captain of the "Fort George" at this time stated to the Chief Officer that he had put his crew on a short allowance of water, and that he had a fortnight's allowance at that rate. He said he had been trying to get into Coringa, and now was endeavouring to get into the track of the mail steamers. The log-book of the "Fort George" shewed that on Sunday, the 28th of September, she encountered a hurricane, and that about 10-30 A. M. her foremast was borne away, carrying with it the main and mizen masts and bowsprit.

From that time she had continued to drift to the southward and westward until the 8th of October, when she fell in with the "Colombo," being then about 60 miles from the nearest point of the coast. During this time she had drifted about 190 miles, and had been increasing her distance from the coast, being carried by the current to the southward in spite of the utmost efforts of the Captain to keep her head to the north and west. On the 6th of October there is an entry in the log: "The ship heading this last 24 hours almost north-north-west has made three miles of southing." On the 7th: "This last 24 hours the ship has 6 miles of southing while steering west-north-west." The Captain of the "Fort George" stated that he had a spar 27 feet long which he intended to put up for a jury mainmast. He had not rigged it or tried to get it up, because the "Fort George" had been rolling about too much, and it must have endangered the lives of the men to attempt it in so heavy a swell. It was proved that the beginning of October, when the north-east monsoon is setting in, is a dangerous time for ships on the Madras coast. Captain Farquhar stated he thought that without assistance the "Fort George" could not have got into a safe port, and that if bad weather had come on, he was not sure she would have lived. Captain James Orr, the Master of the "Fort George," who evidently did and would have done for his ship all that a skilful and determined seaman could do, proved that the hull of the "Fort George" which was a very strong new iron ship, was perfectly tight, and that she had made no water even during the storm; that on the 5th of October he spoke the "Ayrshire" which was bound for Calcutta, and desired the master to report him there; that he did not want water, and did not ask the "Ayrshire" for it; that at 2 quarts per man per day he had enough for thirty days; that if he could have got up his jury mainmast he could have got to Madras; that had he not met with the steamer, he would have gone on shore, anchored with a single anchor, and sent men off in the long-boat to the nearest port. Captain Hanley, Lloyd's surveyor, also stated that, looking to the position of the ship as marked on the chart, he did not think that, having regard to the current and wind, Capt.

Orr would have had any difficulty in reaching the shore. I am satisfied, however, that the position of the "Fort George" was one of very considerable peril. In spite of Captain Hanleys' statement of probabilities to the contrary, and of the hopes of her commander, the "Fort George" day by day had increased, or did not diminish, her distance from the shore down to the time when the "Colombo" met with her. It is clear from the log that she was almost unmanageable with the small quantity of sail she was able to spread; and it is not clear when the Captain might have been able to get up the jury mainmast, or that there might not have been loss of life in attempting it. The "Colombo" took the "Fort George" in tow about 1.30 P. M. on the 8th of October, and continued to tow her till 2.20 of the 10th, having passed the station of the pilot brigs at the Sandheads, and left her in charge of a steam tug, which brought her up to Calcutta. The service caused a delay of 24 hours in the arrival of the "Colombo" at Calcutta, and an actual loss to her owners for extra coal, oil, tallow, and provisions consumed, for extra wages, for a new hawser, chain cable, and other tackle expended of about Rupees 3,700. The value of the "Fort George" is proved to have been Rupees 43,920; the nett value of the cargo, after deducting all charges for landing, customs duty, and expenses of sale, Rs. 6,97,748; making a total of Rupees 7,43,668. Had intelligence of the position of the "Fort George" reached Calcutta by telegraph or otherwise, it was proved by the Captain, who was a witness for both parties, that if the agents of the owners had sent a steam tug to bring her up, they would have had to pay for the service Rupees 11,000, *viz.*, at the rate of 1,000 rupees per day, and that eleven days must have been occupied in the service. The principles upon which Courts of Admiralty go in awarding salvage are stated in *Maude and Pollock on Shipping*, page 430, where the cases on this subject are collected. It is there said that the amount awarded "depends in each particular case upon the value of the property, the danger from which it has been rescued, the time expended, the expense incurred by the salvors, and the success of their efforts. The Court looks not merely to the exact quantum of service performed in the case itself, but to the general interests of navigation and commerce which are protected by exertions of this nature." In the instructions to the Receiver of Wrecks, the Board of Trade says (article 91): "When the services have been rendered by steam vessels, they are always considered as entitled to a very liberal reward, not only on account of the great value of the property which is thereby exposed to risk, but because of the great skill and power of vessels of that description, and the expedition with which

services are generally performed by them," and that is in accordance with cases in the Admiralty Court. *Vide* the *London Merchant* (3 Hagg 394), the *Howard* (Ibid. 256), and the *Isabella* (Ibid. 427). In estimating the amount of salvage awarded in the *Travellers* (3 Hagg 370), Sir John Nicholl said: "The primary object is the danger of the property saved, and its value, and the assistance actually received; the secondary the risk to the salvor and the property; the skill, the time employed, and other collateral circumstances." What is a fit remuneration for this steamer? She did not go out on purpose; there was no extraordinary risk to the steamer, nor peril to the persons on board; the time employed was short, the vessel near to port, and her value was about £4,000; but her services, I must remember, effected a rescue from imminent peril of a property of upwards of £12,000. If in the present case I award £1,000, which is not quite 10 per cent., that will, in my judgment, form a proper remuneration, and I award that sum with the expenses.

Looking, then, at the great value of the property saved, considering, as I do, that there was danger to the lives of the crew of the salvaged vessel; looking at the risk to which the ship and cargo were exposed; the great value and the great power of the steam-ship which rendered the service by which the property was saved, and the expeditious manner in which she was consequently able to perform the service,—I think this is a case for a liberal reward, and not for payment as for a towage service. The true interests of commerce require that such services should be remunerated in such a manner that owners should be induced, not merely from motives of humanity, but without disregarding their own interests, readily to permit masters to render services like the present to ships in distress. In the present case I award Rupees 50,000 to the salvors. In apportioning the sum awarded I think that Captain Farquhar's sagacity and promptitude must be rewarded by an apportionment of Rupees 7,500. The owners of the "Colombo" will receive Rupees 35,000, and the officers and crew of the "Colombo" will receive Rupees 7,500, to be distributed amongst them in proportion to their wages. I give the salvors their costs.

(Before Mr. Justice Morgan.)

URNACHURN CHETTY and another vs. W. GORDON.

A dinghee laden with gilders valued at 20,000 rupees was being propelled across the river, when a squall coming on, and the dinghee being in some danger, the gilders were taken on board a flat for safety, and kept there till the squall subsided. Held that the owners of the flat had no claim for salvage, and their 150 rupees was a fair remuneration for services rendered.

Mr. Eglinton and Mr. Hyde for plaintiffs.

Mr. Bell and Mr. Lowe for defendant.

In this case the plaintiffs sued the defendant for Rs. 5,000, money had and received to the use of the plaintiffs under the following circumstances.

It appeared that the plaintiffs had seven boxes of gilders, valued at about Rs. 20,000, consigned to them, and that on the 1st of April the ship *Lightning* was lying in the river at Sulkea with the gilders on board. The plaintiffs accordingly sent two of their clerks to fetch the boxes. The clerks engaged a dinghee with a manjee and two oarsmen, reached the *Lightning* in safety, and started on the return journey with the gilders on board. When they had reached a spot about 50 yards from the shore, a heavy squall arose from the north-west, and the dinghee made for the flat. According to the plaintiffs' account, the men in the dinghee fastened their boat to the flat, but some of the sailors untied it and set the dinghee again adrift. She then drove down the stream, but the persons on board dragged themselves back by a chain fastened to the moorings, and attempted a second time to make fast the dinghee. This the sailors endeavoured to prevent, and one of the clerks on board the dinghee called out to the Captain of the flat that he had treasure on board. The Captain of the flat thereupon let himself down into the dinghee, and, with the aid of the persons in her, took the treasure on board the flat. The plaintiffs' witnesses swore that one of the clerks never left the dinghee at all. The defendant, on the other hand, swore that the dinghee was abandoned and half full of water, and that he had incurred great risk by jumping into her as he did. Several witnesses were called on his behalf, but their evidence was very conflicting. As to what occurred subsequently, the parties

were less at variance. Rupees 10 were at first offered to the Captain, and in the course of the evening on which the squall occurred Captain Galston went on board the flat, accompanied by one of the Chettys, and offered 150 rupees. Captain Gordon said he would refer the matter to the parties to whom the flat belonged, and on his return from their office declined the offer, claiming 8,000 rupees as salvage, and refusing to part with the gilders for less. Both parties then put the matter in the hands of their solicitors; and Mr. Barrow, on behalf of the defendant, agreed to give up the gilders on receiving a deposit of Rs. 5,000, to abide the result of the trial of the question as to whether Captain Gordon had or had not any, and what, salvage claim. After the matter had been placed in the hands of the solicitors, an offer of Rupees 1,000 had been made by the plaintiffs, but the defendant refused to settle the affair under Rs. 2,000. The case was adjourned several times on account of Captain Gordon's absence from Calcutta. A great number of witnesses were examined, and the case occupied the attention of the Court the whole of one day, and half of another. His Lordship delivered judgment as follows:

Mr. Justice Morgan:—The defendant in this case has no doubt performed some service, but I am of opinion that the services alleged to have been rendered have been grossly exaggerated. The action is brought to recover the sum of Rs. 5,000, which the defendant claims as salvage. The case has been conducted very properly on both sides. The facts of the case, as represented by the defendant, are so strange, that I cannot arrive at any other conclusion than that he has suppressed some of the circumstances which occurred. The witnesses produced on his behalf allege that the dinghee had lost the whole of her crew and passengers. One person is produced who states that he was standing in the middle of the flat when he heard the noise of the collision between the dinghee and the flat. He then walks to the side of the flat, lifts a man on board out of the dinghee, and takes no more notice of the matter. That account certainly is not very credible. We next find the dinghee in a position of some danger near the stern of the flat. There was a current running, which, had she been left to herself, would probably have swept her away. Had she struck the buoy she would probably have been lost. The defendant and his witnesses do not clearly tell us what happened afterwards. From the defendant's own evidence I certainly thought that the defendant incurred considerable danger, but the evidence of his witnesses does not bear that assertion out. After the squall was over the owners seem to have got on board the dinghee again, and to have found her in a condition

in which she could swim. The defendant's story is so singular that one cannot help suspecting that the version so given is very imperfect. The account of the plaintiffs is very different; and, however painful it may be, I must determine that one or other version is incorrect. The case of the plaintiffs seems to me to supply some material facts which are wanting in that of the defendant, and to be more worthy of credit. According to their statement, the dinghee was not abandoned at any time; and I am of opinion that either from excitement, or from some other motive, the defendant is incorrect in stating that when the dinghee reached the flat there was only one man on board. I believe that the boat was not abandoned, but still think that some service was rendered. I think that the evidence of Mr. Galston is reliable; and I cannot help expressing my regret that the matter did not terminate in the acceptance of that gentleman's offer. I think that the offer then made of 150 rupees were a very fair one, and that the claim now advanced by the defendant is preposterous. No doubt the Captain assisted in putting the dinghee in a place of safety, and his conduct so far was meritorious; but he underwent no great bodily pain, and has greatly exaggerated the circumstances of the case. With regard to the offer of 1,000 rupees that was made after the matter was in the hands of the solicitors, and under some degree of compulsion, I am of opinion that 150 rupees is a suitable remuneration for the services rendered, and the verdict must be for the plaintiffs. The costs on scale No. 2 will be paid by the defendant.

Verdict for plaintiffs with costs.

JAUDUBCHUNDER GHOSE, MUTTYLOLL GHOSE, AND ZUSSICKCHUNDER GHOSE
vs. BENODBEHARRY GHOSE.

A, one of four brothers in joint possession of ancestral property, separates himself in food, worship and estate, leaving his three brothers jointly possessed of their undivided three-fourth shares. A dies unassociated, leaving a son and heir, B. The three brothers continue and die associated—two without heirs, and the third leaving a son and heir, C. B has no claim to any part of the undivided three-fourth shares as against C, who takes the whole absolutely.

Mr. Bell and Mr. Cowell for the plaintiffs.

The Advocate-General and Mr. Eglinton for the defendant.

*Mr. Justice Wells:—*This suit was heard and disposed of by me on the 1st of April in the present year, and my judgment was then given in favour of the defendant.

Mr. Bell, on behalf of the plaintiffs, made an application, under the 376th section of Act VIII. of 1859, for a review of judgment on the ground that the suit raised an important question of Hindoo law, and one deserving further consideration. I granted a review, and the case came on again for hearing on the 21st July.

This is a suit for a partition of a certain portion of a house and land at Sunker Ghose's Lane in Calcutta. It appears that one Siboopersaud Ghosé, late of Sunker Ghose's Lane, died many years ago, leaving four sons—Prawnkissen, Moheschunder, Chundercaunt, and Rajkissen. Seven years after the death of Siboopersaud, Prawnkissen separated himself from his three brothers, and a partition of the ancestral property, consisting of land, houses, and moveable property, took place. The house and land, the subject-matter of this suit, was formerly the joint family dwelling-house of the four brothers. Chundercaunt died six years after the partition, leaving one son, the present defendant, and a widow. Three years after the death of Chundercaunt, Prawnkissen died, leaving three sons, the present plaintiffs. In the year 1853 Rajkissen died, leaving only a widow. Moheschunder died intestate in 1857 without issue.

Prawnkissen lived with his family, entirely separate in food and worship from his three brothers, who lived together up to the time of their death as an undivided family.

The defendant, as the son of one of the three brothers who lived joint in food and worship, claims to be the sole male representative of his father, Chundercaunt, and of his uncles, Moheschunder and Rajkissen; and the plaintiffs, as the sons of Prawnkissen, claim to participate in their uncle Moheschunder's share of the estate.

The following issue was settled : " Whether the partition of 1853 was a partition between all the four brothers, or a partition in respect of Prawnkissen alone."

On behalf of the plaintiffs the chief point made by Mr. Bell was that, under the circumstances of this case, according to Hindoo law in Bengal, the plaintiffs were entitled to some share in the property left by Moheschunder. I will now consider the authorities bearing upon the subject. At page 26, Vol. I. of Sir F. Macnaghten's *Hindoo Law*, the general law is

thus stated: "In default of father and mother, brothers inherit—first, the uterine associated brothers; next, the unassociated brothers of the whole blood; thirdly, the associated brothers of the half-blood; and fourthly, the unassociated brothers of the whole blood." At page 195 of Shamachurn Sircar's valuable *Digest of the Hindoo Law*, it is clearly and distinctly stated that among the whole brothers' sons, re-united and not re-united, the succession devolves on the re-united one. Several authorities are cited as illustrative of, or bearing on, this principle. The same work contains the following legal opinion, examined and approved of by Sir W. Macnaghten: "The brothers having separated, if one of them die without heirs, his estate shall be equally shared by his brothers, provided there be no particular evidence of a re-union having taken place between the deceased and the brother with whom he resided till his death." See *Vyavastha Durpana*, p. 503.

The authorities for the doctrine are laid down in the *Dayabhaga*. If there be evidence of an express and distinct re-union, and one of the re-united brothers die, the associated brother is alone entitled to the succession, to the entire exclusion of the unassociated brother. See *Macnaghten's Hindoo Law*, Vol. II., ch. 5, case 24, pp. 173-174. How re-union is effected is shown by *Vrihaspati* in the following text: "He who, being once separated, again through affection dwells together with his father, brother, or paternal uncle, is termed re-united." He thus shows that persons who by birth have common rights in the estate acquired by the father and grandfather, as father and son, brothers, uncle and nephew, are re-united when, after having made a partition, they live together through mutual affection as inhabitants of the same house, annulling the previous partition. See *Vyavastha Durpana*, p. 207. And it would seem that, according to Hindoo law, if only one brother out of four separates entirely it is a virtual separation of all; and though the remaining three brothers continue still joint, they are to be supposed to have re-united.

I have had an opportunity of consulting my learned colleague Mr. Justice Sumbhoonauth Pundit on the general question of Hindoo law involved in the consideration of the present case, and the learned Judge is of opinion that the defendant is entitled exclusively to succeed to the estate of his uncle.

I have come to the conclusion that the plaintiffs are not entitled to any portion of Moheschunder's share, and affirm the decree made at the original

hearing. The plaintiffs are to pay the costs occasioned by the rehearing such costs to be taxed under scale No. 2.

(Before Mr. Justice Morgan.)

ALEXANDER H. CAMPBELL AND OTHERS *vs.* PATRICK KEITH AND OTHERS.

Principal and Agent—Extent of authority.

Mr. Eglinton and Mr. Newmarch for the plaintiffs.

The Advocate-General and Mr. Hyde for the defendants.

In this action the plaintiffs sought to recover from the defendants the sum of Rupees 10,701, the amount of damage said to have been sustained by the plaintiffs in consequence of misconduct on the part of the defendants while acting as their agents.

This case, which occupied the Court the entire day, was tried solely upon documentary evidence consisting of some 150 letters. The particulars were as follows. The plaintiffs, merchants at Bombay, wrote to the defendants at Calcutta on the 10th of January 1860, instructing them to purchase on account of the plaintiffs a quantity of rice. The price was not to exceed 7-6 per cwt., cost and freight included. On two several occasions an advance was made, and the limit was ultimately fixed by the plaintiffs at 8-6 cost and freight, the freight to be estimated at £3-10-0 a ton, or in case of necessity at £3-7-6. The defendants sent word to their agents Messrs. Hay and Co. of Akyab to execute the order, and a number of letters passed between the parties. On the 2nd July the plaintiffs wrote to the defendants, enclosing a copy of the charter party of a vessel named the *Bombay*, about 1,400 tons, which they had taken up for conveyance of the rice from Akyab. At the same time they instructed the defendants, if they should have been unable to procure a cargo, to re-let the *Bombay* upon the best terms possible. Messrs. Hay and Co., finding that there was no prospect of obtaining a cargo in time for the *Bombay*, endeavoured to re-charter her, but were unable to do so, except conditionally. A conditional re-charter was accordingly effected on the terms that Messrs. Weber and Co., the parties to whom the re-charter was made, should be at liberty to reject the vessel, if their agents should have chartered any other ship on their behalf. It subsequently turned out that a small vessel named the *Druses* had been taken up for Messrs. Weber and Co., who however consented to retain the *Bombay*, on condition

that Messrs. Hay and Co. would take over the *Druses*, and load the rice upon her, there being just about sufficient to provide her with a cargo. In consequence, however, of the high price which Messrs. Hay and Co. were compelled to pay for the *Druses*, namely, £4-10 per ton, the price of the rice so loaded amounted, cost and freight, to 9s. 4½d. per cwt., instead of 8s. 6d., the price to which they were limited by the plaintiffs. An offer was then made by a third party to take up the *Druses* at a cost of 5s. per ton less than the price at which she was chartered by Messrs. Hay and Co., provided the rice were made over with her at cost price. Messrs. Hay and Co. accordingly parted with the rice and the ship, leaving a profit for Messrs. Campbell and Co. of about £700 upon the whole transaction. The plaintiffs thereupon wrote to the defendants ratifying their conduct up to the taking of the *Druses*, but no further.

Mr. Eglinton and *Mr. Newmarch* contended for the plaintiffs that they had a right not only to the profit realised by the re-charter of the *Bombay*, but also to that which would have accrued if the *Druses* and her cargo had not been parted with. They urged further that although they did not impute fraud, negligence, or carelessness to the defendants, nevertheless the plaintiffs were in law entitled to damages by the principle laid down in *Callin vs. Bell*, 4 Campbell, p. 183. In that case the agent had diverted the goods from their original destination, because he entertained a *bonâ fide* belief that it was for the benefit of his principal so to do; but the goods so diverted having been swallowed up by an earthquake, he (the agent) was declared liable. The present case, the learned Counsel submitted, fell exactly within the case of *Callin vs. Bell*. The defendants had no general, but only a special agency, and had exceeded their instructions. For any loss resulting from such excess they must be held liable, and it was no answer to such loss to say that they had made a large profit on the *Bombay*.

The *Advocate-General* in reply maintained that the defendants, so far from having acted with anything like negligence, appeared, on the contrary, to have used every exertion in the interest of their clients. The terms of the correspondence gave them a wide discretion. In one letter was the expression "Re-let the *Bombay* on the best terms possible;" in another was the phrase "Let nothing interfere with the re-charter of the *Bombay*," shewing clearly the urgency of the plaintiffs in regard to that part of the transaction. There was nothing in the subsequent letters which terminated this authority. It was not to be tolerated that the plaintiffs should stop short in the middle of a

transaction at the highest point of profit, and repudiate the rest. They must take the transaction as whole and entire, and it was not open to them to split it at will. The defendants had gone out of their way, as the evidence shewed, in re-chartering the *Bombay* to serve the interests of their constituents, and had sustained a considerable loss thereby. Another ship, the *Darmstadt Bank*, was then upon their hands, and they might have given her in the place of the *Bombay*. Had they done so, they would have secured for themselves not only the commission on the *Bombay*, but also the £700 profit which was now realized for the plaintiffs. The taking up the *Druses* was a condition of the re-charter of the *Bombay*; and the high price which Messrs. Hay and Co. were forced to pay for her, namely, £4-10 per ton, brought the rice up to far above the limit assigned. Under these circumstances, the defendants were perfectly justified in parting with the *Druses* at a loss of 5s. per ton; and as, the season being at an end, no one would take the ship without the rice on board of her, the parting with the rice became also a matter of necessity. The turning point of the case, however, was that when on the 24th September the defendants' letter was received, announcing the probability of the charter of the *Druses* being thrown up, together with the cargo, plaintiffs did not at once repudiate their authority, but intimated that they waited to see what would be done. This was inconsistent with the notion that the plaintiffs then stood upon any want of authority in the defendants and Hay and Co. The defendants were fully authorized to act as they had done, and the present suit was one which never ought to have been brought.

Mr. Justice Morgan said it appeared that the grounds on which the plaintiffs sought to impose this liability on the defendants was the fact of the plaintiffs having employed the defendants as agents, and that a certain point having been reached, at which the plaintiffs allege that defendants' authority terminated, the defendants continued to act, and so exceeded their authority. Another ground was, that the defendants, being agents, exercised their authority in so negligent a way as to entitle the plaintiffs to damages. The second ground, however, seemed to have been abandoned, and the first ground appeared to constitute the main basis of the plaintiffs' contention, namely, that the defendants exercised their authority properly up to the charter of the *Druses*, and that what took place afterwards was quite unauthorized. Before finally disposing of the case, he would read over the correspondence once again. He must, however, say that there were points in the correspondence on the part of the plaintiffs which shewed that, though they had knowledge of matters

that occurred, their letters were not those of men who imputed to the defendants the usurpation of an excess of authority in their actions. This circumstance would seem to shew that the plaintiffs' case as now set up was not correct "as to the defendants acting entirely without authority." This view, moreover, would appear to be supported by the plaintiffs neglecting to employ the telegraph, when they might have done so. His Lordship added that the intimation of his opinion was that the defendants, having authority, had exercised that authority in a proper and reasonable way, and that the plaintiffs had no right of action. He would, however, look through the correspondence again in order to see whether there was anything in the letters which indicated a termination of that authority, and supported the view of the learned Counsel for the plaintiffs, namely, "that the defendants had no right to dispose of the *Druses*, and no authority to sell the rice."

On the 14th September *Mr. Justice Morgan* delivered judgment as follows :

Mr. Justice Morgan :—I think the right conclusion to be drawn from the correspondence in this case is, that the defendants and their Akyab agents, Messrs. Hay and Co., had authority to dispose of the *Druses* and her cargo.

It is not necessary to distinguish between the acts of the defendants and of Messrs. Hay and Co., since no question is made regarding the separate liability of either. The plaintiffs contend that the *Druses* having been chartered for them, and the rice on board of her having been purchased with their funds, the agency of the defendants no longer continued in the month of September 1860—certainly not to the extent of authorizing the transfer by them of ship and cargo to Messrs. Weber and Co. ; and that the plaintiffs are entitled, as against the defendants, to repudiate their proceedings, and to hold them liable for the damages caused by this transfer.

The defendants' authority was from the first extensive, and such as left them a large discretion, as is shown by the conduct of all parties in the matter of the re-charter of the *Bombay* ; and though they would, perhaps, have been justified in regarding that authority as ended when the *Druses* was laden, yet they might also well suppose that a shipment by the *Druses* (a small vessel forced on them at a high rate of freight as the condition of the favourable re-charter of the *Bombay*) was far from being a complete or satisfactory execution of their commission. Their letters show that they were

anxious to dispose of the *Druses*, even at a sacrifice, and upon the terms (as stated in their letter of the 8th September forwarded to the plaintiffs) of transferring her cargo with her. The plaintiffs, being informed of the defendants' intentions, expressly refer in their letter of the 24th September to the possibility of Messrs. Hay and Co. re-letting the ship and re-selling her cargo; but while they complain (not without reason) of the confused advices which their correspondents had given them, they do not then repudiate the authority of the defendants to act in the manner proposed. It is proper to add, however, that a few days later (by letter of the 27th September) they state that they decline to recognize Messrs. Hay and Co.'s proceedings in disposing of the ship and cargo.

The defendants on the 12th November, in a letter to the plaintiffs, thus explain and justify their own and Messrs. Hay and Co.'s proceedings: "We submit that, in fairness, the whole arrangement ought, so far as you are concerned, to be viewed as one transaction, the result of which is a good profit to yourselves; and that our friends were entitled to presume that, such being secured, you would prefer submitting to a loss of 5s. per ton on the small cargo which the *Druses* would carry, reducing a little the profit on the *Bombay* to having a cargo of rice on your account by the former at nearly £1 per ton above your limit."

It is true that the gain accruing to the plaintiffs by the *Bombay's* re-charter cannot excuse the defendants, if they exceeded their authority in disposing of the *Druses* and her cargo. In my opinion, the defendants had the requisite authority to dispose of the latter ship. As to the transfer of her cargo, which is particularly the matter in question in this suit, it is not disputed that, if the re-charter of the *Druses* was authorized, the transfer of the cargo with the vessel was, under the circumstances, justifiable. I understand a passage in one of the plaintiffs' letters (31st October 1860) to admit this, and it is also one of the admissions formally made in the suit.

The defendants have throughout acted in good faith, and it is not contended that any neglect or want of due diligence appears in their conduct of this business.

At some stages of the transactions the plaintiffs had certainly cause to complain of the imperfect and contradictory information given to them, and their suspicions were, perhaps, unduly aroused by the defendants' refusal to

send for their perusal a separate letter from Messrs. Hay and Co.*to the defendants on the subject of the execution of the rice orders, to which reference was made in another letter transmitted to the plaintiffs.

The whole correspondence is now before the Court. My inference from it is, that the defendants have acted with diligence and in good faith (which is not indeed disputed), and also within the limits of their authority. The decree will be for the defendants with costs.

Decree accordingly.

APPELLATE TESTAMENTARY JURISDICTION.

(Before the Hon'ble Mr. Justice Wells, Hon'ble Mr. Justice Morgan, and Hon'ble Mr. Justice Levinge.)

S. M. SARODASOONDERY DOSSEE *vs.* TINCOWRY NUNDY.

Decree of the lower Court, so far as it pronounces against the validity of the will, and condemns the promovent in costs, reversed. The will of a childless Hindoo giving power to adopt a son, though opposed to the interests of the widow and the next heir in reversion, is not inofficious.

A Court of Appeal cannot refer to the evidence in another case, or act upon the impression made by it on the Court below.

The rule of the Privy Council not to disturb a judgment of a Court in India upon a question of fact, unless it is clear from the probabilities of the case that the judgment is wrong, however necessary as regards a Court of Appeal far removed from India, would hardly be extended, as one equally necessary and applicable, with the same strictness to a Court of Appeal in India.

Mr. Doyne and Mr. Graham for appellant.

Mr. Paul and Mr. Newmarch for respondent.

*Mr. Justice Wells:—*This is an appeal from the judgment of the Chief Justice and Mr. Justice Norman in a cause or business of proving in solemn form of law the alleged last will and testament and codicil of Shamchunder Paul Chowdry, deceased.

It was a question of some difficulty whether the Court had jurisdiction to entertain the appeal, but that question has already been determined in the affirmative.

The deceased was the last survivor of four brothers who formed a joint Hindoo family, and who had all died without issue; and it is admitted that if the deceased has died intestate, the promovent, his widow, is his immediate heiress according to Hindoo law, and the impugnant, his sister's son, is his nearest reversionary heir.

It appears that in March 1858 Mr. Mackintosh, who was then a member of the firm of Messrs. Molloy, Mackintosh, and Dallas, the attorneys of the deceased, suggested to him that he should make a will. It is not stated under what circumstances the suggestion was made; but the deceased, who was then in full health, declined to adopt the suggestion, saying "that it was not usual for a man to make a will till he was going to die." He was, as natives generally are, averse to give any one, however near of kin or above suspicion,

an interest in his death, and hence his disinclination to make a will till he believed he was about to die.

Early in March 1861, when his health was in a very precarious state, Mr. Molloy advised him to make a will, telling him "death was certain;" and on the 15th of the same month, and again on the 10th of the following month, he sent Mr. Moses, his managing clerk, and Nubkissen Bonnerjee, his cash-keeper, to the deceased to suggest to him that he should make a will, and give his wife authority to adopt a son.

It may seem extraordinary that a European gentleman like Mr. Molloy should have recommended a Hindoo to adopt a son against the interests of his wife and nephew; but it must be remembered that Mr. Molloy had passed in the practice of his profession upwards of forty years in this country, and, as a lawyer, had peculiar opportunities of becoming acquainted with the opinions of Hindoos on the subject of adoption. He says he looked at the matter in a Hindoo point of view, and, we suppose, thought that to advise adoption would be consonant with the feelings and wishes of his client; the more so as, in default of a son, the inheritance would pass out of the family; for Tincowry, though a relative, was the representative of another family.

Though, according to the recollection of Mr. Molloy, the idea of adoption originated with him, it is not improbable that it was in the first instance suggested to him. But be this as it may, the real question is, whether it was or was not adopted by the deceased freely, and so as to be as much a spontaneous act on his part as if it had originated entirely with himself. No force or coercion was used, no undue influence was exercised, and Mr. Molloy did no more than make a simple suggestion—once personally, and twice through Mr. Moses and his native cashier. It does not appear that the deceased said anything to Mr. Molloy himself, but on the first occasion that Mr. Moses saw him he said he would consider the matter; and on the second occasion, believing that the time had now arrived when it was proper to make a will, he said: "Tell Mr. Molloy to prepare a document." The caution evinced by him in taking time to consider shows that, however deficient in the higher qualities of the mind, he was not the man to commit himself to a course of action without first bringing his own judgment to bear upon it; and that when he eventually decided that Mr. Molloy should prepare a document, he did so as the result of his own free will and pleasure. No dishonesty of intention is imputed to Mr. Moses; and his evidence as to what passed on both the occasions is corroborated by Nubkissen Bonnerjee, and is further corroborated by the fact stated in the

affidavit of Mr. Moses, and alluded to in his evidence and not contradicted, that on the occasion of the first interview with the deceased he spoke to him about his giving power to his wife to take a son by adoption in the presence of Tincowry Nundy and several other persons.

It is to be regretted that Mr. Molloy did not immediately act upon the instructions conveyed to him ; for if a will prepared by him had been properly executed in his presence, it is probable the present litigation would have been avoided ; but treating the matter as not being pressing, he did nothing between the 10th April, when the instructions were given, and the 13th of the same month, when the draft of the alleged will was prepared ; and from this point the facts of the case, as stated by or on behalf of the promovent, are impugned by the impugnant, and treated with suspicion by the Court below. It is alleged that on the date last mentioned the deceased, finding that his instructions to Mr. Molloy had not been attended to, directed his mookhtear, Nobogopaul Dutt, in the presence of Bhoobunnessur Bonnerjee, the family priest, to draw up a will, giving his widow authority to adopt a son, and in the event of the death of such son to adopt another, and so on to the extent of five sons in succession ; that a draft will was accordingly prepared by Nobogopaul Dutt, and by him read over to and approved by the deceased in the presence of the said Bhoobunnessur Bonnerjee, of Mudden Mohun Mookerjee, an ameen in his service, and Denonauth Paul, a connection of the deceased ; that at the request of the deceased a fair copy was then made ; but as the hour (3 or 4 P.M.) at which it was completed was considered unlucky, it was not then signed by the deceased, but was signed by him the next morning in the presence of the ameen and the family priest already named, and of Mothoormohun Gosamee, the gooroo, or spiritual instructor of the deceased, Gopaul Ghose, a khansammah, and Hurrishchunder Biswas, a mookhtear,—all of whom subscribed their names as attesting witnesses.

The will, though executed on the 14th of April, was, as well as the draft, written out on the 13th ; and it is thought a most suspicious circumstance that the draft, as well as the will, should be dated on the day the will was executed. It is not improbable the date was left blank when the draft was originally prepared, and was filled in either as soon as it became known that the execution of the will had been postponed, or on the following day at the time of the execution itself. The fact of the postponement has been questioned, but we see no reason to doubt it, as it would have answered the purpose of conspirators equally well to have executed it on the 13th as on the 14th. The date

in the draft is in the handwriting of Nobogopaul Dutt, the writer of the draft ; but the date in the will is not only in different ink from that of the writing in the body, but is supposed not to be in the handwriting of Mudden Mohun Mookerjee, the writer of the will. This difference in the colour of the ink is easily accounted for. The date and the signature were evidently written with the same ink, and must, consequently, have been written at the same time ; and although there is a difference between the writing of the body and that of the date, yet that difference is not greater than between the writing of the same person in the one case done carefully, and in the other hastily ; and it will be found that the resemblance between the writing of the date and the writing of the signature of Mudden Mohun is such as to make it next to certain that both were written by the same hand, and, consequently, by the hand that wrote the body of the document.

It is proved that the deceased, on the 10th of April, was minded to make a will ; and as he had made up his mind, it is more than probable (unless it can be shown that incapacity had intervened) that he was of the same mind on the 13th, when it is alleged the instructions for a will were given, and on the 14th, when it is alleged the will now propounded was executed, especially as it does not appear that he was of a fickle disposition, or had by persuasion or influence been turned aside from his purpose. The alleged action on the 13th and 14th is enterly consistent with the intention expressed by the deceased as late as the 10th.

After the will had been executed and attested, it is alleged that the deceased gave it to Nobogopaul Dutt with instructions to take it to Mr. Molloy and Mr. Moses, and request them to come and hear him acknowledge it. It does not appear that a word was said about sending it to Mr. Molloy and Mr. Moses till after it was executed. The idea was a pure after-thought, and the reason why it was sent was probably because, as a communication had been already made to Mr. Molloy through Mr. Moses about a will, it was thought safer that they should know that one had been executed, and should come and see it acknowledged.

The witnesses in support of the will have sworn that it was not sent to Mr. Molloy as instructions, and their evidence upon this point is certainly consistent with probability. Mr. Molloy had not attended to the instructions conveyed to him on the 10th, and the deceased could not have been particularly inclined to send as instructions a will which he was anxious should be completed without

delay. It was not given to Mr. Molloy as instructions, but as an executed will, to be acknowledged in his presence, and as such was treated by him throughout. If it had been intended as instructions, why did the deceased not send the draft of the will the day before, as soon as it was prepared? Why should he have had a fair copy made, and waited till the next day? And why, especially, should he have executed it?

It appears that Nobogopaul Dutt did not go direct to Mr. Molloy, but went first to Mr. Moses at Ballygunge; and this, it is said, is not sufficiently accounted for. Now, Mr. Molloy could not speak Bengallee, though he, to a certain extent, understood it; and it is well known that his native business was managed by Mr. Moses, whose thorough knowledge of the language and long experience in the profession peculiarly fitted him for the management of such a business. He was the person to attend to native clients, and was the medium of communication between them and Mr. Molloy. As the 14th was a Sunday, the office was closed, and Nobogopaul Dutt knew that it would be useless to go to Mr. Molloy without Mr. Moses; and rather than wait at the office till Mr. Moses was sent for, he did what was most natural under the circumstances: he went to the residence of Mr. Moses, and brought him to the office.

Although it is certain, upon the evidence of Mr. Molloy and Mr. Moses, that the alleged will was brought to Mr. Molloy, yet it is suggested that it was brought, not at the instance of the deceased, but in furtherance of a conspiracy to defeat the right of inheritance of the next heir in reversion by creating a nearer heir. But to suppose this is to suppose that the object of the conspirators was to ensure detection and failure in the place of success; for nothing more likely to lead to the discovery of the plot (if plot there was) can be imagined than the fact of inviting Mr. Molloy and Mr. Moses to come and see the deceased acknowledge as genuine a forged document. Such a course is opposed to the idea of a conspiracy, and makes the idea seem very improbable. To have obtained to a forged document the names of Mr. Molloy and Mr. Moses would, no doubt, have raised in its favour a strong presumption of genuineness; and it is suggested that it was to secure this advantage that any risk that there might be in bringing these gentlemen in contact with the deceased was incurred, but that the risk was not great; for, as the document was only to be acknowledged, not executed, Mr. Molloy and Mr. Moses would not be particular, and it was easy to impose upon the deceased in his then state of mental and physical prostration. But Mr. Molloy and Mr. Moses were bound to be as particular with respect to a will

acknowledged before them as with respect to a will to be executed in their presence ; and it is impossible to suppose that it was expected that they could in this instance relax or otherwise fail in their duty, without supposing that they were parties to the conspiracy. Nor can it be supposed that any deception could have been practised upon the deceased in the presence of these gentlemen, who were there to watch and protect his interests, without supposing either that they joined in the fraud, or were so utterly careless or wantonly indifferent to what was passing before them, that they failed to discover that the deceased was no longer in a disposing state of mind. But Mr. Molloy and Mr. Moses have both been acquitted of dishonesty, and the capacity of the testator has been established to our entire satisfaction.

It is in evidence that shortly after Nobogopaul Dutt had been sent to Mr. Molloy with the will, the deceased expressed a wish to leave Rs. 50 a month to his brother's widow, and Rs. 50 a month to the impugnant, and a house to live in worth Rs. 2,000 ; that thereupon a second copy of the draft was prepared, embodying these bequests, and was read over to, and approved of by, the deceased, and was afterwards, at his request, taken to Mr. Molloy, who had the additional matter added to the will, and having done so proceeded to the house of the deceased, accompanied by Mr. Moses ; and that the will and codicil were then, in the presence of Mr. Molloy and Mr. Moses, read over to, and approved and acknowledged by, the deceased, who, however, wishing to consider whether he would not add the name of some other person as executor jointly with his wife, postponed the execution of the codicil, and died six days after without having executed it. The will of his brother, under which he took as general devisee and residuary legatee, had not then been set aside ; and in wishing to provide for his brother's widow and Tincowry, he showed that he was alive to their interests, and was well-disposed towards them. It does not appear that he expressed any wish to have a second copy of the will made. All that he seemed to wish was to add to the existing will, not to prepare a new will. Hurrischunder Mookerjee, the writer of the second copy, says : " He (the deceased) desired me to prepare a codicil, and to add to the will. He desired me to prepare a new draft"—*i. e.*, not of the will ; for the will was only to be added to, not altered, but the draft of a new document, *viz.*, of the codicil, which was to be added to the will. He also says : " The Baboo had given me a memo., and according to that I wrote on B. I took the memo. to Mr. Molloy's office." The memo. was, no doubt, taken down by Hurrischunder from instructions given by the deceased, and was either the new draft itself, or contained instructions

for the new draft. And having obtained the memo., Hurrischunder says: "I copied the will from the draft, and then added the codicil." His own evidence shows that in copying the will he exceeded his instructions. He probably thought it would be better that all the wishes of the deceased should be contained in one document, and he prepared such a document; and it is evident that both he and his supposed co conspirators intended that it should be executed in the presence of Mr. Molloy and Mr. Moses, and should supersede the will which had been already executed. The evidence, however, has failed to show that their intention in this respect was also the intention of the deceased. If he had intended that this second document should supersede the first, he would have executed it, as he did the first, before sending it to Mr. Molloy; and in sending it to Mr. Molloy he intended no more than that the legacies mentioned in it should be added to the will—an intention which was properly carried out. On the supposition that the will is a forgery, it may be said that the parties concerned in the forgery were anxious to add to the forged will the legacies in favour of the sister-in law and nephew, in order to make the will seem not unnatural, and so to increase the chances in its favour. But if the will is a forgery, it must have been sometime in process of concoction; and how is it that the legacies were never thought of till just after the first document had been delivered to Mr. Molloy as an executed will? It was, besides, quite as easy to have taken it to Mr. Molloy in as complete a state as the former document; but this was not done. On the contrary, it was taken to Mr. Molloy as a document, not only not executed, but to be executed in his presence—a thing not accordant with any other view than that they were conscious they were acting, *bond fide*.

The fact that the second paper was taken to Mr. Molloy so soon after the first shows that the parties were not acting according to any pre-arranged plan, but according to instructions given at different times, and such as one would expect from a dying man anxious to do the best for himself with reference to his own spiritual interests, without neglecting the temporal interests of others. After the deceased had signed the will (assuming that he did so), he must, in his view of the matter as a Hindoo, have thought that he had now secured himself as respects the future life, and his mind naturally turned towards those who were dependent upon him, but for whom he had not yet made any provision—and the codicil was the result.

On the 13th May 1861 an application was made on behalf of the widow for probate of the alleged will and codicil, supported by the joint affidavit of

the widow. Bhoobunnessur Bonnerjee, Mothoormohun Gossamee, Hurrishchunder Biswas, Muddenmohun Mookerjee, and Mr. Molloy, sworn by Mr. Molloy on the 13th, and by the other deponents on the 11th of May, in which it is stated by Bhoobunnessur, Mothoormohun, and Muddenmohun that the will was signed in the presence of them and Gopaul Ghose, and that the signatures of themselves, of Hurrishchunder Biswas, and Gopaul Ghose, as witnesses, are of the respective proper handwriting of themselves, Hurrishchunder Biswas, and Gopaul Ghose. On the 13th a caveat was entered by the impugnant, supported by his own affidavit, the affidavit of Soorjeecomar Mullick, Muddoosoodun Mitter, and Panchcowrie Mookerjee, and the affidavit of Gopaul Ghose,—all sworn and filed on the 21st of May 1861. In his affidavit, Gopaul Ghose denies that the signature, "Gopaul Ghose," appearing at the foot of the alleged will is in his handwriting, or was written by his authority; and says that the same is a forgery, and also that he was not present on the occasion of the alleged will being signed by the deceased, or by any of the persons who purport to be attesting witnesses thereto. He says he was not present on the occasion of the alleged will being signed; but he does not say where he was on the morning of the 14th, or whether a will could have been executed without his knowing it; nor does he allude to the visit of Mr. Molloy and Mr. Moses, or say one word about what is alleged to have taken place on the previous day. What was the reason of such reticence on his part when making an affidavit in contradiction of the affidavit filed in support of the will?

On the 12th of June Bhoobunnessur Bonnerjee, Hurrishchunder Biswas, Muddenmohun Mookerjee, Denonauth Paul, Nobogopaul Dutt, Brojohoree Paramanick, Denonauth Chatterjee, and Ramassore Saumunto made an affidavit in affirmation of the affidavit sworn on the 11th and 13th of May, in which they state in the 23rd paragraph: "We and Gopaul Ghose Khansamah were respectively, on the said 14th day of April last, present at the hour of about 8 o'clock in the forenoon at the said residence of the said Shamchunder Paul Chowdry, deceased, at Colootollah aforesaid, and saw the said Shamchunder Paul Chowdry sign the paper writing marked 'A' and annexed to the affidavit of Sarodasoondery Dossee, Mothoormohun Gossaul, Bhoobunnessur Bundopadhyia, Hurrishchunder Biswas, Muodenmohun Mookhopadhyia, and Robert Molloy, sworn in these goods on the 11th and 13th days of May last, and now remaining filed on record in this honourable Court, and that the name and signature (Bengallee) written at the head of the said paper writing, marked 'A' as aforesaid, in the Bengallee language and character, was written in our presence by the deceased, and is his

genuine signature. We, therefore, positively deny it to be a forgery, and not the signature of the said Shamchunder Paul Chowdry, as is untruly stated in the ninth paragraph of the said affidavit of the said Soorjeeoomar Mullick, Muddoo-soodun Mitter, and Panchcowrie Mookerjee." (24th paragraph): "We were on the day, hour, and place in the preceding paragraph mentioned present, and saw the said Gopaul Ghose, whose name and addition appear at the foot of the said paper writing marked 'A' as aforesaid, as one of the witnesses to the said paper writing, sign his said name and addition as appears therein, and that the words, name, signature, and addition (Bengallee) at the foot of the said paper writing are in the proper handwriting of the said Gopaul Ghose." This affidavit, as also an affidavit made by Mr. Moses on the same day, was withdrawn from the Registrar's office before it had been actually filed, as it was arranged between the parties that the caveat should not be argued, but that the widow should at once proceed to prove the will in solemn form. The affidavits having been once delivered into the office ought not to have been withdrawn; but as they are forthcoming, it is clear that it was not for the purpose of suppression or any other improper object that they were withdrawn, but simply because they were no longer required in consequence of the arrangement that had been come to. Indeed, it was stated by Mr. Moses that they were withdrawn after Mr. Temple, the proctor on the opposite side, had seen them; and his evidence upon this point remains uncontradicted.

It is now admitted that the attestation of Gopaul is not in his handwriting, but in the handwriting of Muddenmohun, who says he was requested by Gopaul to write his name, as Gopaul said he could not write it well himself. This admission establishes in this respect a most serious contradiction of the affidavits sworn on the 11th and 13th of May, and one of the affidavits sworn on the 13th of June; and the explanation made by the witnesses is unworthy of belief. It is possible that the first affidavit was prepared from general instructions, and that the attention of the parties, when the affidavit was explained to them, was not particularly called to the statement as to the attestation of Gopaul being in his handwriting. This, however, cannot be said with reference to the second affidavit, which was prepared for a special purpose, under special instructions, and was carefully explained to the parties; and, therefore, we can come to no other conclusion than that the statement referred to was deliberately made. It is not unlikely that it got into the first affidavit unintentionally, and was not noticed till contradicted by Gopaul; but, alarmed at the contradiction, the parties, instead of setting it right by avowing the

mistake, thought it would injure their case to do so, and so committed themselves to a lie, which they afterwards regretted, and have now disowned. Their credit, though weakened, has not been destroyed. Their evidence must be received with suspicion, and if opposed by any strong improbability, it may be of little avail; but if consistent, not only with probability, but with other evidence of an unimpeachable character, it cannot, so far as it is so, be rejected. And their evidence upon the other facts deposed to is certainly less improbable than that of Gopaul. In his affidavit he has denied that he was present on the occasion of the alleged will being signed, or that he authorized his name to be written as a witness; but if so, it is difficult to understand why his name should have been put to the document. He was but a menial servant, and his signature was not only not essential, but was of little value, and not at all such as to tempt the commission of a forgery. The signatures of four men of a higher position were surely enough for every purpose. If, however, it was for some inconceivable reason thought desirable to have his signature, how is it that no attempt was made to induce him to become a witness, or, if his name had been already used, to sanction the forgery? No such attempt appears to have been made, and he is allowed to come here without any influence having been used to tamper with him or to keep him back. And this is the more remarkable, as, if the will is a forgery, money must have been used to secure the co operation of the witnesses, and would not have been withheld from Gopaul, if it had availed; and it is not to be supposed that he was quite above the influence of money, while the other witnesses, though superior to Gopaul as regards social position, were just the opposite in this respect. Gopaul has sworn that he is able to write, and that he kept the private accounts of the deceased. The accounts have not been produced, and his ability to write was put to no other test than that of requiring him to write his name—an accomplishment not difficult to acquire. It may be, however, that Gopaul was skilled in the art of writing, and kept the accounts; and, if so, this would be well known in the family, and his signature, if forged, and especially if forged by members of the household, would be closely imitated; but if forged, why have the forgers withdrawn from the statement put forth in their affidavit that the handwriting was Gopaul's, and thus unnecessarily drawn down suspicion upon their case? Was it in consequence of any qualms of conscience which made them hesitate to add one more falsehood to the many they had come prepared to utter, if they knew the will to be a forgery? To have persisted in their original assertion would have been better and safer than to have shifted their

ground, especially as their united testimony would far outweigh the testimony of one person, and he a person whose humble position would not entitle him to any considerable credit when opposed to persons superior in position and outward respectability to himself. In his evidence Gopaul says : " Brojohoree Paramanick called me and said, ' I have used your name in *the* will, and you must go to Calcutta.' I said, ' You say you have used my name in *the* will ; why did you not ask me, I could have signed it myself ? ' " Here, both in the request and the answer, the document spoken of is *the* will, and Gopaul does not in his answer plead ignorance as to a will having been executed. He speaks of the will as if he knew of its existence. He remembers Mr. Molloy and Mr. Moses calling at the house on the 14th to see the deceased, and says : " When the *sahibs* came I was downstairs, warming water for the Baboo." But he must have followed the *sahibs* upstairs, for he says in another part of his evidence : " The *sahibs* went into my master's room ; " and adds : " I was not in the room when the *sahibs* entered ; " but he does not say he was not in the room after they had entered ; and we have no hesitation in saying that we believe that, wherever he was, he was a close observer of what was transpiring. He says : " I, as a menial servant, had no idea why the *sahibs* came ; " thus excusing his ignorance on the ground that he was a menial servant, but a servant who could read and write and keep his master's accounts ; and surely a menial servant with far less pretensions might easily understand what passed at an interview from which none were excluded, and at which the conversation was conducted in Bengalee, and a Bengalee instrument to which his name was appended as an attesting witness read and acknowledged. He also says : " I never saw either of the *sahibs* there before ; " intending it to be inferred that the *sahibs* had never been there before. Mr. Moses went to see the deceased once before, and therefore Gopaul was either absent on both occasions, which is improbable, or he was present and saw Mr. Moses. In the one case he was aware of Mr. Moses's visits, and in the other it is to be supposed that he became aware of them ; and in saying that he never saw either of the *sahibs* there before, he must have said what was untrue, or, if literally true, was intended to mislead the Court. We must say that we distrust this witness ; and the reasons given by him for leaving the service of the deceased do not tend to lessen this distrust. His evidence fails to convince us that his name was not written with his consent ; and we believe the fact would never have been called in question, if he had not sold himself to serve the interests of the opposite party. And if deprived of the benefit of his evidence, the impugnant is reduced to nothing but his personal answer ; and the

affidavits put in in support of the caveat, which, though not evidence against the promonent, may be used against the impugnant, and are important documents.

The allegation in this case was filed on the 3rd of October 1861. It is true, as observed in the judgment below, that it is not in the form of a *condidit*; nor ought it to be in the same form. The two are different forms of pleading, and are applicable to different states of circumstances. The first plea, which contains the statement of facts intended to be relied on in a testamentary suit, is called the *allegation*, or when of a merely formal and simple character, going no further than the *factum* of the instrument, the *condidit* (*Wad. Digest*, p. 60). It is the invariable practice to allege in a *condidit* that "the testator well understood the contents of the will, and approved of the same, and did will, give, and do in all things as therein is contained. But the same thing cannot be said with reference to an *allegation*, as there are forms of allegation on the ecclesiastical books in which this declaration has been omitted, as is also the case as regards many of the allegations filed in this Court. The omission to allege in so many words, that "the testator well understood the contents of the will, and approved of the same, and did will, give, and do in all things as therein is contained," becomes very immaterial, if the *allegation* contains, as it ought to do, such a statement of facts as would enable the Court to draw as a conclusion that which in a *condidit* is only affirmed as a fact. And we think the allegation in the present case does contain such a statement. It states that the instructions for the will were given by the deceased himself; that the draft was read to and approved by him; that the fair copy was made at his request, was signed by him as and for his last will, and was then sent by him to Mr. Molloy, with the request that he should come and see it acknowledged; that the instructions for the codicil were also given by him; that the clause embodying such instructions was read to, and approved by him, and was also sent by him to Mr. Molloy; and that the will and codicil were afterwards read over to, and approved and acknowledged by him, in the presence of Mr. Molloy and Mr. Moses. And, assuming these facts to be true, it is impossible to come to any other conclusion than that the deceased "well understood the contents of the will, and approved of the same, and did will, give, and do in all things as therein is contained."

From the same facts may also be deduced the capacity of the deceased; for the act of giving instructions for, and approving of, a will imply capacity. But this is not left to inference alone; it is affirmatively and positively alleged

in the 13th article of the allegation thus: "At the time when he gave the original instructions for the said will, and when the same was read over to, and executed by him, and when he gave instructions for the said codicil, and when the said will and codicil were read over to, and acknowledged by him, in presence of the said Mr. Molloy and Mr. Moses, the said Shamchunder Paul Chowdry, although ill and weak in body, was of sound and disposing mind and memory, and fully competent to make a will, or perform any other serious or rational act requiring judgment and reflection." And as very much depends upon the capacity of the deceased, it is necessary to consider how far this article of the allegation has been proved.

It is an admitted fact that Mr. Molloy and Mr. Moses called on the deceased on the 14th of April with the alleged will and codicil. It does not appear that a single direct question was put to Mr. Moses, either in his examination-in-chief or cross-examination, as to the capacity of the deceased. Mr. Molloy, however, says: "I have no doubt he was competent;" and certainly his answers to the questions put to him by Mr. Molloy and Mr. Moses; his pointing to the codicil, and asking that it should be read to him; and his postponing the execution of the codicil, in order to consider whether it would be desirable to appoint another executor to assist his wife in the management of his estate, show that he was capable of exercising the faculties of his mind. Gopaul Ghose, after stating that the deceased was sometimes in his senses and sometimes not, has admitted that on the 14th he was in his senses, and when Dr. Shosheebooshun Seal saw him on the same day about his bill he perfectly understood what he had come to him about. In his affidavit, in support of the caveat, the impugnant says nothing as to the state of mind of the deceased, from which it is reasonable to infer that at that time he believed the deceased was in a sound state of mind; and in his personal answer, which, upon this question, is indirect and evasive, he states (answering to the 13th article of the allegation): "I say that I have been informed, and believe that at the date of the said alleged transaction, that is to say, on the 13th and 14th days of April 1861, the said Shamchunder Paul Chowdry was so extremely debilitated as to be incapable of performing any serious rational act requiring much judgment and reflection; but whether his weakness was so great as to render him not of sound and disposing mind, memory, and understanding, or competent to make a will, I am ignorant and unable to answer." It does not appear where the impugnant was on the 13th and 14th of April; but as he speaks merely from information and belief, and not from personal knowledge, it is to be presumed

that he was not in Calcutta. He does not say who furnished the information which obtained his credence; nor does he venture to say, although the utmost latitude may be used in speaking from information obtained from *undisclosed* sources, that the deceased was not of sound mind or competent to make a will. All that he says upon information is, that "the deceased was so extremely debilitated as to be incapable of performing any rational act requiring much judgment and reflection"—a statement which is utterly valueless, as no evidence has been offered to substantiate it. Soorjeeoomar Mullick, Muddoosoodun Mitter, and Panchcowrie Mookerjee, who made an affidavit in support of the caveat, and who probably supplied the information referred to by the impugnant in his personal answer, have not been called; but their affidavit, which is before the Court, discloses facts which have an important bearing on the state of mind of the deceased. In the fifth paragraph Soorjeeoomar says that he saw the deceased at six o'clock in the evening of the 14th, but the deceased made no mention to him of the will; and in the 8th paragraph Muddoosoodun says that on the same day, long after the alleged will was made, the deceased, though in a very weak state, conversed with him, and, among other things, inquired why there was such a delay about his being taken up to Ranaghat, but made no mention whatever about his having made a will. These statements of Soorjeeoomar and Muddoosoodun are adopted by the impugnant, and are set out in his personal answer as true; and, therefore, according to the showing both of the impugnant himself and those who must be treated as his creatures, the deceased was able to converse on the evening of the 14th, and could have spoken about a will, as it was expected he would have done if a will had been executed. And if able in the evening to converse and speak about a will, it cannot be said that he was then incompetent; still less can it be said that he was incompetent at an earlier period of the day. His competency is not denied either by the impugnant or by Soorjeeoomar, Muddoosoodun, or Panchcowrie; and the absence of denial in reference to a question of such vital importance is almost tantamount to an omission, the presumption being that the fact was not denied, because it was incapable of denial. It would seem that the deceased was in a weak and exhausted state, and that it was an effort for him to speak; and it is not remarkable that he did not choose to exert himself in order to inform each servant who came in that he had made a will; though, as the will had been acknowledged publicly, and under circumstances to attract notice, it would have been most remarkable if the fact of such acknowledgment did not, in a very short space of time, become known to every member of the household,

whether present or absent at the time. The deponents do not say that they knew nothing of a will having been made, but only that the deceased made no mention of a will on a particular occasion. They may have heard him speak of a will on other occasions, or may have been told about a will having been executed by others; but these suppositions, though by no means improbable, have not been negatived. The competency of the deceased is not only sworn to by Mr. Molloy, but is inferable both from the evidence of Gopaul, the personal answer of the impugnant, and the affidavit of Soorjeecoomar, Muddoo-soodun, and Panchcowrie. The question, however, is no longer in issue, as in the course of the argument on behalf of the impugnant it was conceded that the deceased expected Mr. Molloy to bring a will, and had sense enough to know that a will was being read over to a him. It was also admitted that the testator did on the 10th give instructions for a will, and may have done so on the 13th.

Starting with these admissions, the evidence of Mr. Molloy and Mr. Moses becomes very important. Mr. Molloy says: "I went to church on the 14th. On returning from church I found Mr. Moses and Gopaul Dutt at my office. The will was shewn to me, and about the same time, or shortly afterwards, Hurris Biswas and Brojohorree Paramanick came in and brought the other paper. It was without the additional lines in small writing. In all other respects it was the same as now. B was produced as a second copy making provision for parties not mentioned in the will. It was then clear and without obliteration or additions. The addition was written by my desire by Hurrischunder. The portion above was struck out by my desire as ambiguous. Hurris Biswas wrote the small writing at foot of the will. That on B was written afresh and afterwards copied on the will that had been executed. We (Moses, I, Brojo, Hurris, and Gopaul Dutt) proceeded to the house immediately. We were taken to a small room in which Shamchunder was lying on a bed on the floor. He was very ill and emaciated; incipient dropsy was apparent, but was not serious. I think he was suffering from spleen. I was told that his body was swollen. I spoke to him in Hindustani, and asked him, '*Kaisa hi?*' He said: 'I am in this condition,' in a low voice. He was conscious of his state, and not willing to say he was worse, while he could not say he was better. He said: 'I am in this condition,' that is, 'I am as you see me; judge for yourself.'" Mr. Molloy goes on to say: "Moses began to speak to him. I sat by him nearly opposite to his chest. Moses was close to him. Moses said: 'Baboo, we understand you have sent for us; we have come.' He, Moses, spoke in Bengalee.

I understood he said 'Yes,' and nodded. Moses told him we had come to witness his will or to see him deliver it, and he said 'Yes.' Moses held out the will to Shamchunder, and asked him if that was his will, and he said 'Yes.' It was held so that he could see it quite close to him. I desired the will to be read after he said 'Yes.' It was read by one of the mooktears, and Moses explained it in Bengalee in our hearing, to see if he understood it. He questioned him as the reading went on. I could understand what Moses said. I have no doubt he understood what was said to him. When the reading was finished, Shamchunder pointed to the foot of the will, and asked that it should be read to him." Bearing in mind that the deceased was competent, would he have said "Yes" and nodded assent when Mr. Moses said: "Baboo, we understand you have sent for us," if he had not sent for them? And would he have said "Yes" when told by Mr. Moses that he had come to witness his will, or to see him deliver it, if he had not sent for them for that purpose? And so conscious was the deceased, and so much alive to what was going on, that, after the will had been read to him, he pointed to the addition at the foot, and asked that that should be read to him. Mr. Molloy says further "that it (meaning the codicil) was read completely to him; he was told it was an alteration I proposed to make (which I suggested); when that was read he was asked if he approved it; he said 'Yes.' I myself then asked him if he would sign it. He did not answer me, but spoke in a lower tone to the man on my left hand. I believe it was the last witness (Denonauth Chatterjee). I caught the word 'executor;' no other words. When I saw he hesitated about giving me an answer, I asked what was the matter. A great many spoke." It is supposed that so many spoke together with the design of creating a confusion, so as to prevent Mr. Molloy and Mr. Moses from hearing what was said by the deceased; but it is to be observed that this speaking together took place after the testator had spoken, and not while he was in the act of speaking, and is not in itself an unnatural circumstance. At any rate nothing further was done till silence was restored. Mr. Molloy said he would hear none but the Baboo; and then he says: "Moses spoke to the Baboo and asked what was the matter, and the man (Denonauth, we suppose) said what he heard, namely, that the Baboo wished to consider about the appointment of an executor." Denonath in his evidence says: "I repeated aloud what Shamchunder said to me;" and, as he spoke loud enough to be heard by all in the room, the deceased, at whose head he was seated, and who was neither deaf nor incompetent, must have heard what was said, and would have instantly repudiated what purported to be his answer, if

it had not been so. We think the answer given by the deceased was correctly conveyed by Denonauth, as correctly as if the expression of it had been heard from his own lips; and the word "executor" heard both by Mr. Molloy and Mr. Moses shews that whatever was said by the deceased had relation to the office of executor. Mr. Molloy proceeds: "The Baboo was then asked by Mr. Moses if there was anything more he wished, and the Baboo said there was nothing more. I heard the Baboo. I said immediately to Mr. Moses and the bystanders: 'If there is any question about appointing an executor, let him take time; he is not going to die; it can be done to-morrow.' I spoke partly in Hindustani and partly in English. I told the Baboo and the bystanders I would come either that evening or to-morrow." It appears the deceased left that same evening for Ranaghat, and it is supposed that his having left was not his own act, but the act of others whose object in removing him was that Mr. Molloy might have no further opportunities of seeing him. Mr. Molloy has with an excess of candour, without judgment, said that his impression was that unfair means were taken to get the deceased away. But it appears both from the answer of the impugnant and the affidavit of Soorjeeoomar and others (which are in substance the same), as well as from the evidence of Gopaul, that the deceased was anxious to be taken to Ranaghat. Soorjeeoomar, in the 5th paragraph of the affidavit, which is embodied in the answer, says: "Between the hours of 10 and 12 o'clock in the forenoon, on the 14th of April last, I left the lodging, and proceeded to engage a boat for the purpose of going to Ranaghat, and also to make arrangements for the departure of the deceased;" and Muddoosoodun, in the 8th paragraph, which is also embodied in the answer, says: "The deceased, though then in a very weak state, conversed with me, and, among other things, inquired why there was such a delay about his being taken to Ranaghat;" and the affidavit on this point is corroborated by Gopaul, who says: "He was in the same state when the *sahibs* came as in the morning; he did not mend. I knew he was going to Ranaghat at the time he was about to go." So that the deceased had been thinking of going to Ranaghat before the will was acknowledged; and it may seem strange that he should have allowed Mr. Molloy to leave him under the impression that if he came the next day he would find him; but the deceased was in a dying, restless state, and was naturally desirous to return home. Muddoosoodun had been sent to engage a boat, and did not return till long after Mr. Molloy had left; so that the deceased was not himself aware, while Mr. Molloy was with him, when he should be able to leave. The desire to

leave was strong upon him in the evening, for he then anxiously inquired why there was delay; and under the influence of such feelings he was glad to leave as soon as it was announced to him that arrangements had been made. It is clear, notwithstanding Mr. Molloy's impression, that no unfair means were used to get him away, and none could have been used without its being known to Soorjeecoomar and Muddoosoodun, who took an active part in making arrangements to remove him, and to Panchcowrie and Gopaul, who went with him, but who do not pretend to have such knowledge.

Mr. Molloy, in the affidavit in support of the application for probate, says: "I heard the will read over to the deceased, who, though very ill and in a weak state, *appeared* to understand and approve of the same." The expression "*appeared*" is thought to indicate the existence of some doubt in Mr. Molloy's mind; but he could have used it in no other sense than that his mind was satisfied, else we cannot believe that he would have been a party to the affidavit, or have afterwards appeared as a witness in support of the will. It would have been better if the affidavit had been made somewhat fuller. Mr. Molloy has said that there was no intentional reservation on his part, and perhaps, relying on the credit that he had a right to expect would be given to him, he was not so careful or particular as he would otherwise have been. It is true he has said, "I anticipated the most determined opposition;" but when did he anticipate this opposition? If from the commencement, what does he mean by saying further on in his evidence: "I did not anticipate the slightest opposition to the probate in common form"? If he anticipated opposition at a very early stage, it would be to the probate in common form; and, indeed, the opposition always is to the probate in common form, which, if already issued, is recalled and kept in suspense, and if not yet issued, is retained till the opposition is disposed of; but we incline to think that no opposition was anticipated till after the affidavit was filed, which will account not only for the affidavit being comparatively meagre, but also for the irregularities complained of, and which, on any other supposition, would have been carefully avoided.

Mr. Moses corroborates Mr. Molloy in every particular. He describes the deceased as having been lying on a bed on the floor, and says: "I sat on a *morah* just under his feet and at the end of the bed. Mr. Molloy was on his left, nearer deceased's head." It is not very clear what Mr. Moses meant by saying he sat under the feet of the deceased at the end of the bed. He

could not have sat below the feet and in a line with his head, else Mr. Molloy could not have been on his left. It would seem that the position of the parties was this. The deceased was lying on the floor. Mr. Molloy was seated on his right somewhere near his head, and Mr. Moses lower down on the right of Mr. Molloy, and towards the foot of the bed ; and so there would be nothing to prevent him, seated as he was on a *morah*, from leaning forward and holding the will at one end, suspended before the deceased, so that he could, without much effort, take the other end and look at the document. Mr. Moses not only shewed him the document, and asked him the question, " Is this your will ? " but, directing his attention to the signature, he asked him specially and particularly, " Is this your signature ? " and he replied " Yes ; " and this is confirmed by Mr. Molloy, who says : " I understood him to acknowledge his signature. " Gopaul Ghose has said : " His hands were much swollen and used to shake ; " and the signature is written, not in a firm, but in a shaky or unsteady hand. He also says : " In my opinion he could not write with that hand ; " and he has stated in his affidavit : " His hands were so much swollen and inflamed, that he was wholly incapable of using or employing them in any way. " Dr. Shosheebooshun Seal, who as a witness is far more reliable than Gopaul Ghose, says : " He could have signed his name with difficulty ; he could contract his fingers to hold a pen to such an extent ; he could have held a reed pen with his fingers ; " and the signature appears to have been written with a reed pen, such as is commonly used by natives in writing in their own language. The assertion of Gopaul, that the deceased was wholly incapable of using or employing his hands, is not borne out by the Doctor, who says : " He could have held a reed pen with his fingers, and could, though with difficulty, have signed his name. " We cannot but believe the Doctor in preference to Gopaul, especially as both Mr. Molloy and Mr. Moses have sworn that the deceased took hold of the will, and afterwards placed it under his pillow with his own hands, which he could not have done if he was wholly incapable of using or employing his hands. The Doctor, who had seen him write, speaking to the character of the signature, says : " It is similar to a certain extent. The word ' Sree ' at the top is not his ; it is more clear. The ' Sree ' is somewhat like the signature. The rest is of a similar character. The ' Sree ' on the English paper (No. 8) is what he used to write. " As the English paper was written at a time when the deceased was fully able to use his hand, it is of little value for the purposes of comparison ; but, according to the Doctor, the signature to the will is, to a certain extent, similar to his

usual signature, except the "Sree" at the commencement, as to which the resemblance is somewhat weaker. The differences pointed out are just such as would be likely to occur, having regard to the state of the deceased at the time the signature is alleged to have been written ; and it would have been a circumstance of grave suspicion if the signature had been perfectly similar to his usual signature when in health. We think the signature was written by the deceased himself.

The irregularities imputed to Mr. Molloy's office afford a strong argument in favour of the *bona fides* both of Mr. Molloy and Mr. Moses, who would have been careful to avoid irregularities, if they knew they were engaged in a transaction of a questionable character. The entry of the 15th of April in the day-book, as far as it relates to the attendance at the house of the deceased, is as follows : " Attending at Shamchurn's house, when, after seeing the executed will and codicil (unexecuted) read to him, he said he had not made up his mind as to appointing some fit person as executor besides his wife, and kept the executed will with unexecuted codicil with him, and promised to let us know on the subject next day." It would have been better had this entry been fuller and more precise ; but Mr. Moses never anticipated that it would be produced in Court, and made the subject of judicial criticism. It was a rough entry, and was no doubt made for the guidance of the bill-maker, and not for the purpose of refreshing his own memory as to circumstances about which he might at any future time be called upon to give evidence in a Court of Justice. The draft bill (D I), made up from the day book, embraces a period of nearly two months. It contains various items, the first of which is dated the 15th of April, and is a transcript of the entry of that date in the day-book, and the last of which is dated the 12th of June. It does not appear when this bill was prepared, but it must have been prepared on or after the date of the last item in it. It was afterwards submitted to Mr. Moses for settlement, and Mr. Moses drew his pen through the first item, as it related to a period during the lifetime of the deceased, which was not the case with respect to the other items ; and he wrote on the back of another bill relating to a still earlier period the draft of a bill (F I), embodying the item which he had struck out from the draft bill (D I). The bill (F I) is as follows : " Attending you on various occasions, conferring on matters of your will, and of authority to your wife to adopt a son, and advising thereon, and receiving instructions to prepare the same. Drawing the same accordingly when you sent us your will in Bengalee,

executed, with request to attend you to hear the same acknowledged by you attending, hearing same read to us when a codicil was added thereto. Attending at your house, hearing same read over to you, and acknowledged when the codicil was left unexecuted, as you wished to add an executor with your wife." The statement "drawing the same" is incorrect, as no will was ever drawn by Mr. Molloy; but it is just such an addition as a bill-maker would introduce for the purpose of showing an exaggerated amount of work done. It could not have been intended to deceive the family, who were aware that no will had been prepared besides the one executed; or to mislead the taxing-officer, whose good offices were not, so far as appears, intended to be invoked with reference to this bill. But this statement in the bill of an imaginary fact shows that the bill could not have been prepared with that amount of care which would be necessary to the success of any special ulterior object to be attained by means of it. It would at least have been pruned of its redundancies, and put into such a form as to avoid suspicion. The fact of the deceased having acknowledged the will is not mentioned in express terms, either in the entry in the day-book or in the affidavit, in support of the application for probate in common form; and because it is mentioned for the first time in the bill, it is supposed the bill was concocted to supply a link in the case. If such was the object, Mr. Moses was the instrument to carry it out, and he could have done so more effectually and with less risk by substituting another day-book for the one produced, which is a rough book, and could easily have been replaced, or at least by substituting another sheet for the one containing the entry which it was thought necessary to alter. But neither has the day-book, nor the first page of the original draft bill containing the entry taken from the day-book, and struck out by Mr. Moses, been suppressed or tampered with; and both were readily produced when required for the purposes of this suit. It cannot be said that the alleged acknowledgment was as much an invention as the alleged drawing of a will; for while it has never been pretended that a will was drawn in Mr. Molloy's office, it is a part of the promovent's case that a will was acknowledged by the deceased; and Mr. Molloy and Mr. Moses (not to speak of the native witnesses) have both pledged their oath to the fact. It is also to be observed that the statement as to the drawing of a will has reference to the action of the attorney, and was made with a view to giving him credit for more than he had done; whereas the other statement has reference to the action of the deceased, and could not have been made with any object such as that referred to. The entry in the day-book was a mere note intended for

the office; but the bill which was intended to be issued was an amplification of the note, and in preparing it Mr. Moses drew upon the knowledge which he possessed, and was thus able to supply a fact not expressly mentioned before. It appears from a memorandum on the draft bill (F I) prepared by Mr. Moses that it, as well as the other bill written on the same sheet, were engrossed on the 19th of some month in 1861, which may be read either as June or July; and the 13th of April, written over an erasure, is the date of both bills; and this date, coupled with the circumstance of its being written over an erasure, has given rise to much suspicion. If fraud was contemplated, what was its object? What fraudulent purpose could be attained by substituting a date prior to that of the alleged acknowledgment for some other date? Mr. Moses is far too keen to have fallen into the error of antedating a bill by inserting a date inconsistent with the facts inserted in the bill by himself. But if to subserve some improper purpose it was thought necessary that the bill should bear another date, it would surely have been safer to have made a fresh copy with the new date than to have altered the date in the original copy. Common prudence would have suggested such a course—a course beset with no difficulties, as Mr. Molloy or Mr. Dallas would not have demurred to sign the second copy, either as an original or as a duplicate, if presented by Mr. Moses. It is to be supposed, however, that Mr. Moses, the shrewd and cautious clerk, was regardless of himself and reckless of consequences, and acted in a matter so seriously affecting his character without any care or forethought. We cannot believe that the bill was concocted, or that the date was altered in furtherance of any unlawful or illegitimate purpose. It is much more probable that the bill was dated by the engrossing writer on the day on which it was engrossed; and that when brought either to Mr. Molloy or Mr. Dallas, or to Mr. Moses, or some other responsible person in the office, it was observed that, though made out in the name of the deceased, it was dated as of a date subsequent to his death, and to cure the inconsistency the copyist was told to erase the date, and insert the date of the entry in the day-book, which, though the 15th of April, is not unlike the 13th, and must have been mistaken for the latter date which has thus come to be inserted in the bill. Any other theory is opposed by the strongest improbabilities. This is as probable as it is simple and natural, and supplies, we think, the true explanation of the alteration in the date of the will.

The day-book contains another entry to which reference has been made; it is this: "June 18. Attending receipt of a Bengalee letter from client relating to the matter of his will. Writing an answer advising thereon." It is ob-

served that neither the letter nor the answer is forthcoming. If the answer had been written in English, a copy would have been found in the letter-book ; but as it was written in Bengalee, a copy was not kept ; the practice being to correspond in English, and there being no Bengalee letter-book in an attorney's office. As things have turned out, it is a pity that these letters were not preserved ; but the fact that they were not preserved affords a reasonable presumption—first, that they were not considered of much importance, and next, that the present litigation was not anticipated. But although not forthcoming, Mr. Molloy or Mr. Moses, or the person who wrote the answer, may have been able to give secondary evidence of their contents ; but no allusion was made to either of these documents in the examination of any of the witnesses, and consequently no evidence was elicited with reference to them.

Mr. Molloy has always maintained an unsullied reputation as an attorney and proctor of the late Supreme Court and of the High Court, and is entitled to the highest credit. He had no interest in the matter beyond that of a proctor, and was incapable of saying what he did not thoroughly believe to be true. Mr. Moses must also be permitted to rank as an independent witness. It is stated by Mr. Molloy that he was aware Mr. Moses had received Rs. 10,000 ; but he was not asked from whom or on what account, and Mr. Moses himself was not examined on the point. We must, therefore, conclude that this sum of money received by Mr. Moses was not improperly received by him. The evidence of Mr. Moses cannot be doubted without also doubting that of Mr. Molloy, as the evidence of both is substantially the same ; and their united evidence is corroborated not only by Hurrishunder, Bhoobunnessur, Denonauth, and Brojohoree, the father of the widow, but also by the widow herself.

It has been observed that the evidence of the widow is to be distrusted, inasmuch as she speaks to facts which she omitted to mention in her affidavit. It is true she did not join in the allegations as to the preparation, execution, and acknowledgment of the will ; but was it necessary that she should do so when these allegations were made by four of the attesting witnesses, and were, to a certain extent, verified by Mr. Molloy ? We do not think it was necessary to encumber the affidavit with the matters contained in her evidence ; and we think she had every opportunity of knowing the facts to which she has sworn. Her evidence is most important, as it is given against her own interests, and that not ignorantly ; for she was aware of the effect of adoption upon her rights as a Hindoo widow, and stated that, in the event of adoption, she would only be

entitled to maintenance, which means that, instead of having the uncontrolled disposal of the income of the estate during her life, she would be reduced to a position of dependence, with only the right to maintenance restricted to the wants of a Hindoo widow, which, as recognized by the Hindoo law, are few and inexpensive. Yet, conscious of all this, she seeks to establish the will, and her evidence was given with that view. It is said she is in the hands of her father, and is influenced by him to support the will, which is necessary to his interests as the manager of the estate. His evidence is so unsatisfactory that, as a witness, we cannot regard him favourably; but we are unable to see how his position, as it would be on the supposition of intestacy, is improved by a will authorizing adoption. With his daughter as heiress he would have the management, with such consequent benefits as there might be, during her life, which with reference to her youth, might reasonably be expected to extend beyond his own. With an adopted son as heir, he would only have the management for a limited period, not exceeding sixteen years, though it might be much less. It may be supposed that he was influenced by the fact that in the case of intestacy, he could only hope for the management during one life, which, after all, might not fulfil the promise of a lengthened duration; whereas, under the will, he would be certain of keeping the management during the infancy of the adopted son and of five sons in succession, if such successive adoptions should be rendered necessary by the casualties of death. But the adoption or successive adoptions could only take place in the lifetime of the widow, as the power to adopt is only given to her; so that if the adopted son, living at the time of her death, survived her but for a short time, there could be no further adoption, not even if such son was not the last of the five to be adopted; and consequently the father could not depend upon more than one life beyond that of his daughter.

It does not appear that there is in his own family any one of a proper age to be adopted; nor does it appear that the adoption of a member of his own family could personally benefit him more than the adoption of a stranger.

The natural relations of an adopted son, or, if taken from the family of his adoptive mother, his more immediate relations, would naturally watch his interests with care, and with jealous care after the death of the widow, as they would only be too glad of an opportunity to displace the manager and to get the management into their own hands. This, however, assumes that, after the death of the widow, the father would still be in a position to retain the management; but this might or might not be. He would not be the natural

guardian of the adopted son next in succession to the widow, and it is by no means certain that a Hindoo widow possesses the power of appointing a guardian by will. What, then, would be his object in preferring a will to an intestacy? It is proved that he has raised considerable sums upon the estate, but how does this fact bear upon the *factum* of the will? The will was in existence in the lifetime of the deceased and long anterior to the date of the loans, and it cannot be said that the will was made with a view to enable him to raise money upon the estates; for he could more easily raise money upon a mortgage which would operate to the full extent of the widow's interest, and possibly to a larger extent, than upon a mortgage which the infant heir might repudiate on attaining his majority, or which might at any time be set aside in a suit commenced in his behalf by a relation or friend acting as his guardian *ad litem*.

If the money raised by the father has been improperly raised, the mortgage by which it is secured may be questioned, whether the will be pronounced against or established. If pronounced against, it may be questioned to any extent beyond the widow's interest; if established, it may be questioned to the same extent up to the time of the adoption, and altogether afterwards, and would not in any respect be protected by the will. The will, if of advantage to the father, is of very doubtful advantage. He can do nothing under it that he could not do without it, and he would have no greater facilities for committing waste as the manager of an infant heir than as the manager of an adult heiress, unless, indeed, it can be imagined that the infant would be absolutely friendless—a thing not probable, as any one (Tincowry not excepted) could, if necessary, proceed to restrain waste on his behalf. If, therefore, the will is fraudulent, and the fraud is attributable to the father, he must have committed the fraud without any adequate motive. He could have forged, or procured to be made by undue influence, a will absolutely in favour of the widow as easily as a will such as this is; but he did not care to benefit her or himself substantially; and, judging from the nature of the will, his only object must have been to benefit the soul of the deceased.

The only attesting witness who has not appeared is Mothoormohun Gossamee, and his absence is a fact open to observation. He was served with a subpoena on behalf of the promovent, and promised to attend, but did not; but as he has not been produced or attempted to be produced by the other side, it is clear he has not seceded from his own party; and it is not improbable that he has kept away in consequence of the statements in the joint affidavit of himself

and others, now admitted to be untrue, as to the signature of Gopaul as an attesting witness to the will being in his own handwriting. The other witnesses, however, including Gopaul, have attended and been examined, and the promovent herself, though a Hindoo woman of rank, has come into Court in a palanquin and given her evidence. Her conduct may be well contrasted with that of Tincowry, who has not only kept himself back, although he could have given important evidence both as to the state of mind of the deceased and as to what took place after he arrived at Ranaghat, but has also avoided tendering for cross-examination any one of the three men who made affidavit on his behalf against the will. He has no doubt exercised a sound discretion, but in doing so he has raised against himself a presumption as strong as the discretion which he has exercised is sound—a presumption, too, which he has done nothing, either by way of explanation or otherwise, to rebut.

The will as it gives authority to adopt a son is, according to the judgment of the lower Court, inofficious. By the Roman law testaments might be set aside as *inofficiosa*, deficient in natural duty, if they totally passed by (without assigning a true and sufficient reason) any of the children of the testator; though, if the child had any legacy, however small, it was a proof the testator had not lost his memory or his reason, which otherwise the law presumed. But the law of England makes no such constrained suppositions. The Ecclesiastical Court, however, will require evidence of full and entire capacity in the testator to support a will which is not an officious one—*i. e.*, consonant with the testator's natural affection and moral duties. (*Montefiore vs. Montefiore*, 2 Add. 361-362. And see *Dew vs. Clarke*, 3 Add. 207-208.) Tincowry, the impugnant in the present case, is not the son of the deceased, nor a brother's son, but a sister's son, and, as such, the representative of another family; and he is next heir to the deceased in consequence of the deceased and his brothers having died without issue. The codicil, whether valid or not, if made by the directions of the testator, and approved of by him, shows an intention on his part to provide for Tincowry by leaving him a house worth Rs. 2,000 and an allowance of Rs. 50 a month. This, according to our English ideas, may seem but a scanty provision for Tincowry, having regard to the fortune of the deceased, but not so according to native ideas; and, judging from the position of dependent relatives in native families, it is probable the deceased never expended upon his nephew so much as fifty rupees a month; and that in leaving him a house to live in and Rs. 50 a month for his support, he considered he was providing for him with bountiful liberality.

We are satisfied with the evidence as to the capacity of the testator, so that, on the supposition that the will is inofficious, we should have no hesitation in saying that the rule which requires evidence of full and entire capacity in the testators to support such a will has been fully complied with. But is the will inofficious? It is said by Menu that a son of any description must be anxiously adopted by a man destitute of male issue for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name. (*Dattaka Chandrika*, 136.) It is expressly ordained in the laws that the adoption is sanctioned for two peculiar purposes—the one for the sake of funeral cake, water, and solemn rites, and the other for the sake of progeny. (*Rungama vs. Atchma*, 4 Moore's Indian Appeals 64.) Solicitude for his future state and the preservation of his lineage are with him who adopts the motives to adoption. His future happiness depends upon the performance of his obsequies and payment of his debts by a son, as the means of redeeming him from an instant state of suffering after death. The dread is of a place called *Put*—a place of horror to which the manes of the childless are supposed to be doomed, there to be tormented with hunger and thirst, for want of those oblations of food and libations of water at prescribed periods which it is the pious and, indeed, indispensable duty of a son (*pultra*) to offer. It is true that, failing a son, a Hindoo's obsequies may be performed by his widow, or, in default of her, by a whole brother or other heirs; but, according to the conception belonging to the subject, not with the same benefit as by a son. That a son, therefore, of some description is with him, in a spiritual sense, next to indispensable, is abundantly certain. (1 *Strange* 73-76.) This being so, can a will made by a Hindoo in compliance with his laws and his religion, as well as natural feelings, be said to be inofficious? Adoption being a substitution for a son begotten, its effect is, by transferring the adopted from his own family, to constitute him son to the adoptor with a consequent exchange of rights and duties. Of these the principal are the rights of succession to the adoptor on the one hand, with the correlative duty of performing for him his last obsequies on the other; the right to inherit being correlative with the right to perform such religious ceremonies. (1 *Strange* 97; *Rungama vs. Athama*, 4 Moore's Indian Appeals 73.) So completely is the son by adoption lopped off from his natural family, and engrafted into his adoptive family, that his connexion with the former, as it regards inheritance, ceases from the moment of adoption, and he becomes the son of the adoptor with all the rights of a son. A son adopted being in the position of a son begotten, why should a will be inofficious which

gives the power to adopt? Tincowry has no more reason to complain of the adoption of a son by the widow than he would have *had* if the adoption had taken place in the lifetime of the deceased, or if a posthumous son had been born. But it is said the deceased had no mind to adopt, or he would have adopted in his lifetime. We agree with Mr. Doyne that a Hindoo does not adopt in his lifetime, unless he is prepared to acknowledge that he has lost the power of procreation; for if his wife is sterile, he may marry another wife, and is enjoined to do so after the lapse of a certain time. There is nothing to show that the deceased believed himself to be sterile; and although it is in evidence that his wife had some internal disease which, unless cured, would incapacitate her from bearing children, yet, as it is not suggested that the disease with which she was affected was incurable, it is not unnatural to suppose that he expected she would, under careful treatment, soon be restored to health. This would account for his not having attended to the subject of adoption till his own life was despaired of. It is also said that the idea of adoption was suggested to the deceased, and did not originate with him. It does not appear that he ever made it the subject of conversation; but is it likely that he, a Hindoo and childless, should never have made it the subject of anxious thought? There is no doubt that the authority to adopt given by the will was suggested to him in the first instance by Mr. Molloy, and then on two occasions by Mr. Moses, acting by the instructions of Mr. Molloy; and it may be, though this is not in evidence, that he was in some degree influenced by the wishes of his young wife and some other members of his family. But it is no part of the testamentary law of England that the making a will must originate with the testator; nor is it required that proof should be given of the commencement of such a transaction, provided it be proved that the deceased completely understood, adopted, and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition. (*Constable and Bailey vs. Tufnel and Mason*, 4 Hagg 477, 3 Knapp 122.) As in the present case the capacity of the deceased has been established, it is, we think, impossible, having regard to the evidence of Mr. Molloy and Mr. Moses, not to believe that the deceased completely understood, adopted, and sanctioned that which was suggested to him, viz., to give his widow authority to adopt.

In the case of *Bamundoss Mookerjee vs. Mussumutt Tarrinee* (7 Moore's Indian Cases, p. 203), cited by Mr. Paul, the Right Hon. T. Pemberton Leigh, in delivering the judgment of the Privy Council on the first point in

the case, says: "An observation, however, is made by the Sudder Dewanny Court that the Zillah Judge, with respect to two of the attesting witnesses, has spoken of them from his own knowledge as being what he calls professional witnesses, persons of no character, and therefore entitled to no credit whatever. He does not say that, as we understand him, from his own personal knowledge of the parties as being in the habit of coming before his Court. Now, the Judges in the Sudder Dewanny Court have passed a severe censure upon the Zillah Judge for making that observation. Their Lordships think it right to say that in that censure they do not at all concur. It is of great importance that the Judge should know the character of the parties, and it is of great advantage to the decision of the case that it is heard by a Judge acquainted with the character of the parties produced as witnesses, who is capable, therefore, of forming an opinion upon the credit due to them." That case may—though we express no opinion upon the point—be an authority for the course taken by the Court below of importing into the consideration of this case their knowledge of the evidence disclosed before it in another case; but it certainly is no authority for the position that we, sitting as a Court of Appeal, would be justified in referring to that other case, or, without such reference, in acting upon the impression made by it upon the Court below.

This Court, though not possessed of the same advantages as the Court below of forming an opinion upon the credit due to witnesses, has equal advantages with it of forming a correct opinion upon questions of pleading and of Hindoo law, upon the evidence of witnesses of undoubted credit, upon the documentary evidence in the case, and also of probabilities arising from the conduct of the parties, from their respective interests, from the absence of material witnesses, and from the fact of the deceased being a Hindoo and childless, and other admitted facts. But whatever be the position of the Court as regards advantages on the one hand, or disadvantages on the other, it cannot, as a Court of Appeal, be relieved from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case. (*Muddoosoodun Sandial vs. Surroopchunder Sirkar Chowdry*, 4 Moore's Indian Appeals 433.) The evidence of Mr. Molloy and Mr. Moses supplies parts of the history of the case which dovetail with the other parts supplied by the Native witnesses, whose evidence therefore is, to a certain extent, entitled to credit. The willingness of the deceased on the 10th of April to make a will similar in its provisions to the instrument now propounded, his competency admitted as well as proved on the 14th (the date of

the alleged will), his having acknowledged the instrument as his will in the presence of Mr. Molloy and Moses, and the officiousness of the instrument as a testamentary disposition, having regard to the feelings of a Hindoo in the position of the deceased, are strong facts in the case, and have greatly influenced our minds in coming to a conclusion different from that expressed in the judgment of the Court below. We think the will was prepared in accordance with the instructions of the deceased, was read to, approved, and executed by him, and was afterwards, with a perfect knowledge of its contents, acknowledged by him as his will; and we pronounce for the full force and validity of the instrument as the last will of the deceased.

The rule of the Privy Council not to disturb a judgment of a Court in India upon a question of the credibility of witnesses, unless it is manifestly clear, from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusion drawn from such evidence (*Misadee Mahomed Casin Sherazee vs. Meerza Ally Mahomed Shooshy and another*, 8 Moore's P. C. Cases, p. 110), however necessary as regards a Court of Appeal far removed from India, would hardly be extended, as one equally necessary and applicable with the same strictness, to a Court of Appeal in India, which has the opportunity of calling witnesses, and has all the advantages to be derived from a personal acquaintance with the people, their feelings, habits and character, as well as other local advantages. But giving full effect to the rule in its application to the present case, we think that it is clear, from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusion drawn from the evidence before it.

The effect of our decision is to reverse the sentence of the Court below, so far only as it pronounces against the validity of the will, and condemns promovent in costs. She will be entitled to her costs of the appeal, as well as of the original suit, out of the estate; but the impugnant having alleged forgery, and failed to prove the allegation, must consider himself fortunate if he has to pay no costs but his own.

As no question as to the codicil has been raised by the memorandum of appeal, or discussed at the Bar, we do not feel ourselves called upon to express any opinion upon this part of the case.

VICE-ADMIRALTY JURISDICTION.

WILLIAM BROWN AND OTHERS

vs.

THE PILOT BRIG OR VESSEL CALLED THE "KEDGEREE."

A Government Brig employed in supplying Pilots to vessels at the Sand-heads was arrested under proceedings in rem. Held that the Brig by 21 and 22 Vic., c. 126, had become the property of the Crown, and, as such, was entitled to the same exemption from arrest as all other Queen's ships, and that the proceedings in rem were therefore illegal.

The *Advocate-General* and *Mr. Eglinton* (Officiating Standing Counsel) for the impugnants.

Mr. Doyne and *Mr. Lowe* for the promovents.

In this case one of the pilot brigs, the *Kedgerie*, had come into collision with a vessel called *The Golden City*. The Master of the vessel, William Brown, one of the promovents in this suit, thereupon obtained an order from this Court for the seizure of the brig. The order was immediately put in force, and the brig arrested.

The *Advocate-General* now moved that the order and warrant of arrest be superseded, and the vessel released. An affidavit of Captain Hill, Assistant to the Master Attendant, stated the full particulars. There were two methods of proceeding in the Court of Admiralty, viz., *in personam*, by issuing a monition to the parties complained against, and *in rem*, by seizing the ship. (2 Brown's Law of Admiralty, p. 396.) But as this vessel was sworn to be the property of Her Majesty, and employed in the public service, the latter remedy was not applicable, and a warrant had been improvidently issued. The reason for allowing an arrest of ordinary merchant vessels was obviously because absent owners and the commanders of vessels could not generally be made to satisfy the damages. In this case, however, no such reason existed, and the practice ceased accordingly. (*Abbott on Shipping*.) The Court of Admiralty had declined to issue a monition to the Lords of the Admiralty in the case of a troop-ship which was complained against for a collision; and it was clear that a vessel, whether of war or otherwise, in the public service, was unlike a merchant vessel, and was not amenable to the ordinary process of Courts of Admiralty, but was considered as *extra commercium*. (*The Prinz Frederik*, 2 Dodson's Reports, p. 451.) Here the property in

this vessel, under Act 21 and 22 Vic., c. 106, sec. 39, was vested in Her Majesty for the purposes of the Government of India; and it could never be that vessels of this description could be liable to this summary process, especially when other and suitable remedies by ordinary action and suit in the Admiralty, which did not exist against the wrongful acts of servants of the Crown in England, were fully provided by the law as applicable to this country against the Secretary of State in respect of the acts of his servants in matters like these.

Mr. Eglinton, on the same side, argued that the case must be considered with reference to the admitted facts, from which it appeared that the brig was at the time of the seizure the property of the Queen, and actually engaged in the service of Government. Under these circumstances, the arrest was illegal: first, as opposed to public policy; and, secondly, as being an arrest of property vested in Her Majesty for the purposes of the State.

Mr. Justice Morgan asked how it was shown that the property was vested in the Queen?

Mr. Eglinton said it was admitted upon the affidavit; and even if formerly belonging to the East India Company, the brig was transferred to the Crown under 21 and 22 Vic., c. 106. Then, if the vessel was the property of the Queen, the *Athol* (1 W. Rob. 374) was an authority to show that she could not be arrested. This principle was in effect recognised in *Winter vs. Miles* (10 East 578) and in *Attorney-General vs. Donaldson* (7 M and W. 422), where it was laid down that the goods of strangers, whilst in any of the Royal palaces, could not be taken in execution, and *à fortiori*, therefore, could not chattels vested in the Queen herself, wherever situate. No distinction could be drawn between a ship of war, as in the case of the *Athol*, engaged in the service of the State and a pilot brig so employed. Each was performing her respective duties; and the question was, whether those duties were on behalf of Government, and in the exercise of authority derived from the Executive. That was admitted in the present case; and the rules founded upon public policy applied, and would have applied equally before the 21 and 22 Vic., c. 106. In *Egerton vs. Brownlow* (4 H. L. C., p. 1), Lord Truro said: "No subject can lawfully do that which has a tendency to be injurious to the public or against the public good which may be termed public policy in relation to

the administration of the law." Here the arrest of the brig defeated her usefulness for public purposes; and if the arrest were legal, there was nothing, should circumstances arise, to prevent a similar state of things with reference to every other vessel belonging to Government.

Mr. Doyne, on behalf of the promovent, said that the question raised by this rule was, whether or not a pilot vessel plying her vocation at the Sandheads has the same privileges as a ship of war. It was quite clear that the position of the two is altogether different. Supposing a ship of war to enjoy exemption *in rem*, that exemption was enjoyed upon two grounds: firstly, because it would be just as contrary to public policy to arrest a ship of war on service as it would be to arrest a soldier on service, which was manifestly illegal; and, secondly, because such an arrest would be derogatory to the Crown, which ought to be approached by a petition of right. Inasmuch as proceedings in Admiralty are altogether *in rem*, they are conducted against the vessel itself, just as if the vessel itself was actually guilty of the wrong. How then, he asked, did the pilot vessel stand upon the same footing as a vessel of war. Pilotage was not compulsory; the pilot vessels were not engaged in service, nor did they cruise against an enemy. They stood altogether upon another ground. Why, then, should it be said they are not liable to arrest for collision? All that the Crown had to do was to give security, and the vessel would be released. There was no means of giving jurisdiction against the vessel except by its arrest. His learned friend the Advocate-General had said that there was another remedy. So there was; for an action might be brought at Common Law, if his client could find out against whom to bring it. It had been decided by the Court in appeal in the case of *Nicholson vs. Mounsey* (15 East, p. 384) that the Captain was not liable for the negligence of his subordinates; so that the case resolved itself into the question of finding out exactly which individual pilot put the helm in a particular way at a particular time, and bringing an action against that particular individual, in which event, if he could pay the amount, his client might recover damages. Although, therefore, there were theoretically two remedies, practically there was only one; therefore it had always been customary to proceed against the ship as the *Actor* and the *Reus*.

Mr. Justice Morgan asked whether he (the learned Counsel) was prepared with any precedent in English law.

Mr. Doyne replied that he was not prepared with any such precedent, though he was by no means inclined to admit that the vessels belonging to the Trinity House in England were not liable to seizure. But, indeed, it was not necessary to look at English law. Matters in India were on a very different footing. Prior to 21 and 22 Vic., c. 106 (*An Act for the better government of India*), India was under the government of the Company, which was nothing but a Company of merchants. The remedies against such a Company were precisely the same as against private individuals. Pilot vessels, therefore, were seizable prior to 21 and 22 Vic., c. 106; and it was difficult to see how that Act could alter the law in such respect. From the case of *Nicholson vs. Mounsey* (15 East, p. 384) and *Lane vs. Cotton* (1 Salk, p. 17) it was quite clear that no action would have lain in such a case as this against the Secretary of State in Council prior to 21 and 22 Vic., c. 106; and he (the learned Counsel) submitted that the Secretary of State in Council was introduced solely to save the dignity of Her Majesty. That was the reason why it was enacted that all suits should be brought by the Secretary of State in Council. The state of things now was exactly identical with the state of things existing prior to 21 and 22 Vic., c. 106; and there seemed to be little doubt but that if a person recovered in an action against the Secretary of State, he might seize the pilot brig, just as under the old system he might have proceeded against the East India Company by sequestration.

Mr. Justice Morgan inquired whether the learned Counsel knew of any case in which property vested in the Crown had been seized.

Mr. Doyne replied that he did not remember any such case, but the reason was that the cases reported all had reference to England, and an action of this kind against the Crown would be an action "*coram nobis*." He thought it ought to be admitted that the seizure of the pilot brig was legal. It was the only remedy which could be had; for any attempt against the senior pilot would clearly be futile, as he would at once ride off upon the case of *Nicholson vs. Mounsey*, 15 East, p. 384.

The *Advocate-General*, in reply, maintained that the argument on the other side confounded two things which were quite distinct, *viz.*, the liability of Government for the acts of their servants in certain departments and the property of the particular proceeding complained of, *viz.*, the arrest of this vessel belonging to Government, and engaged in the public service. It was contended

that the parties would be without remedy, or that the remedy would be difficult, unless this method of arresting a Government vessel were allowed. There was no want of proper remedy under the Statute 21 and 22 Vic. against the Secretary of State in an action properly brought for wrongs committed by his servants. That was decided in October 1861 in the case of the *P. and O. Company vs. The Secretary of State*. Difficulties in adopting known remedies, even if they existed, would not justify the use of an illegal process. It had been shown that two remedies were open ordinarily in the Admiralty—viz., 1st, *in personam*, by proceeding by monition, &c. ; and, 2nd, *in rem*, by seizing the ship. No reason had been assigned for not resorting to the former, and no authority had been given for adopting the latter in the present case, to which such remedy was inapplicable, the property belonging to the Crown. The authorities applicable to ships of war were in principle applicable also to these vessels, both classes being exempt from commercial remedies as belonging to the Crown and the public service. As to the illustration of pilots in the River Thames being liable for collisions, they were notoriously not under the Home Government, but were controlled by a Corporation called the Trinity House. It had been said this was a merely formal seizure, but it was one on which, in default of appearance, the Court might order a sale, and so change the property in the vessel.

Mr. Justice Morgan remarked that if the Secretary of State would enter an appearance, probably the other side would be willing to give up the seizure.

The *Advocate-General* said that though no obstruction was for a moment contemplated to the just course of the law, he had no authority to assent to such a step ; but, on the contrary, would be acting against the tenor of his instructions if he did anything having the semblance of not protesting against the illegality of the *ex parte* proceeding which had taken place. The question now was, whether this arrest was lawful. He submitted that the property belonged to the Queen in trust for the Government of India, and could not be seized except in *execution* of a decree and under the provisions of the statute, which was a very different redress to the present *ex parte* order for arrest before the case was heard.

Mr. Justice Morgan.—The pilot brig *Kedgerie* having been arrested by warrant issuing from the Vice-Admiralty Court, in a cause of damage by

collision, an application has been made to the Court on behalf of the Government for the release of the vessel from the custody of the Marshal, on the ground that the *Kedgerie* is the property of the Crown, and was, when the collision happened, employed in the public service.

In ordinary cases of collision between private vessels, the owner of the damaged vessel, if he resorts to the Court of Admiralty for redress, has the choice of three modes of proceeding—viz., *personally*, against the owner or against the master, or *in rem*, against the ship itself which caused the damage. The last mode of proceeding by arrest of the ship offers, it is said, the greatest security for obtaining substantial justice in furnishing security for a prompt and immediate payment. (See *The Volant*, 1 W. Rob. 387.) But it is not, like certain processes in other Courts, merely a mode of compelling the owners. For if the owners do not appear to the warrant arresting the ship, the proceedings go on without reference to their default, and the decree is confined exclusively to the vessel. In the case of *The Bold Buccleugh* (7 Moore P. C. 267), the nature of this proceeding was explained. The Privy Council there held that by the collision of two vessels a claim or privilege attaches to the ship causing the damage, in favour of the owner of the injured vessel, and this maritime lien is inchoate from the moment the claim or privilege attaches; and when carried into effect by legal process by a proceeding *in rem*, it relates back to the period when it first attached.

The *Advocate-General* contended that the *Kedgerie*, being the property of Her Majesty, and engaged in the public service, is, like the Queen's ships of war, not amenable to the ordinary process of Courts of Admiralty; and he cited two cases in support of this argument. In one of them (*The Prinz Frederik*, 2 Dodson, p. 451) the question whether a foreign ship of war lying in an English port was liable to the civil process of the Court of Admiralty in a cause of salvage, at the suit of British subjects, arose, but was not determined; but in a case there mentioned (*The Comus*), Lord Stowell appears to have held that as against the Crown, or vessels the property of the Crown, the Court had no jurisdiction. In the other case cited (*The Athol* (1 W. Rob. 374), one of Her Majesty's troop-ships having caused damage by collision, the Admiralty Court refused a monition against the Lords of the Admiralty to answer in a suit for damage. No case has been mentioned in which a vessel belonging to the Queen has been arrested; and I find it stated in the argument of Counsel in the late case of the *Leda* (32 L. J. Admiralty, p. 58)

that "there is no instance of suit brought in this (the Admiralty) Court against a ship which is the Queen's ship ; in such case it is always against the officer commanding ;" and the cases of the *Swallow* and the *Inflexible* (*Swabey* 30-32) are referred to. It appears to me upon these authorities, some of which relate to Queen's ships other than ships of war, that the *Kedgerie*, being the property of the Queen, and engaged in the public service, would in England be held exempt from arrest. It was urged by Mr. Doyne, who opposed the application, that the liability of the ship to arrest stands on a different footing in India ; and that as she would have been subject to process while the property of the E. I. Company, she is equally subject to it now under the provisions of the 21st and 22nd Vic. 126, the statute by which the Government of India was transferred to the Crown.

By the 39th section of that statute the real and personal estate of the E. I. Company was vested in Her Majesty to be applied and disposed of for the purposes of the Government of India. The property thus vested in the Crown is expressly declared to be subject to certain liabilities ; whatever suits, remedies, and proceedings might formerly be had and taken against the E. I. Company, persons may still have the same against the Secretary of State in Council of India ; and the property vested in the Crown is liable to the same judgments and executions as it would have been liable to while vested in the Company. The effect of these provisions is that, notwithstanding the transfer of all the property of the E. I. Company to the Crown, the rights and remedies of private persons against such property are in a great degree preserved. When it is said that the vessel would have been liable to be proceeded against before the statute, and that all former rights and remedies are still preserved by the statute, I do not know on what grounds either proposition can be supported. It may be doubted whether a vessel belonging to the government of the East India Company, and engaged in duties of a public nature, like the *Kedgerie*, would have been held liable to this Admiralty process. Many of the reasons for exempting the Queen's public vessels were equally applicable to the exemption of the *Kedgerie* while the property of the East India Company. But it is not necessary that I should determine this question, because, whatever the former liability of the vessel, the effect of the statute is, in my opinion, that the *Kedgerie*, having become the property of the Crown, is entitled to the same exemption from arrest as all other Queen's ships. The words of the statute preserve and continue all such

remedies as may be had by means of personal suit against the Secretary of State in Council, but they do not, in my opinion, authorize proceedings *in rem*, such as the present. The "liabilities" reserved by the 39th section are liabilities which must be enforced by personal suit and execution.

One argument in support of the proceedings against the ship was the difficulty of pursuing with effect any other remedy. That difficulty, if it really exists, which I need not now consider, cannot affect the result of the present application. The warrant of arrest was unadvisedly issued, and must be quashed.

Judgment accordingly.

ORDINARY ORIGINAL CIVIL JURISDICTION.

AYDALL *versus* KELSO.

A tug, though not sufficiently powerful to perform the service, undertook to tow a ship from the Sandheads to Calcutta. The Captain of the ship, though informed by the Pilot that the tug was too weak for the task, allowed her to make the trial, but was ultimately obliged to throw her off. Held that nothing could be recovered upon the original agreement, but that the tug was entitled to a "quantum meruit" for work and labour done.

This was an action to recover the sum of 1,100 rupees upon a promissory note.

Mr. Graham for the plaintiff.

Mr. Hyde for the defendant.

In this case the plaintiff was proprietor of the tug *Banshee*, and the defendant was Captain of the ship *Conflict*, which arrived off the Sandheads on the 10th of November last. The *Conflict*, a large vessel, having 500 troops on board, was waiting for a tug a short distance bellow the floating light, when she was signalled by the *Banshee*, which offered to tow her up to Calcutta for Rs. 1,600. After some discussion as to price, the terms were fixed at Rs. 1,100, and an agreement in the form of a promissory note was drawn up for that amount. The *Banshee* then went off for a pilot, and brought him to the *Conflict*. It appeared that while the tug was passing from the pilot

station to the *Conflict*, the pilot told the Captain that his tug was not sufficiently powerful to tow the *Conflict*, a fact which was also testified to by several other pilots. The Captain of the tug urged that they might give him a trial, and was allowed to take the *Conflict* in tow. On arrival at Saugor Roads the pilot refused to go further, and notified his refusal to the Captain of the *Conflict* in writing. The Captain of the *Banshee* thereupon proceeded with his tug to Kedgerree, and telegraphed from that place to Messrs. Avdall & Co. at Calcutta. The telegram stated that "the *Conflict* was a heavy tow, and that the pilot would not pass her." No reply was received to this message prior to the starting of the tug, and on her arrival at the *Conflict* she found her already in tow of the *Sestos*. The Captain of the tug thereupon declared that a breach of contract had taken place, and that he would remain by the *Conflict* until her arrival in Calcutta, to which the Captain of the *Conflict* answered that he might remain by him as long as he liked, but that he would do so on his own responsibility. An offer was subsequently made by Messrs. Gladstone, Wyllie & Co. to pay Messrs. Avdall & Co. Rs. 100, being the difference between the Rs. 1,100, the sum originally stipulated, and Rs. 1,000, the amount paid to the *Sestos* for her services. This Messrs. Avdall & Co. refused to accept, and the result was the present action.

Mr. Graham for the plaintiff contended that the Captain of the *Conflict* was a man of great experience, and ought to have made himself acquainted with the qualifications of the *Banshee* before engaging her. If he had not done so, he must take the consequences. In any case the plaintiff was entitled to a *quantum meruit* for towage as far as Diamond Harbour, up to which point it was allowed on all sides that the *Banshee* could proceed without danger.

Mr. Hyde for the defendant referred to the case of *Cutter vs. Powell*, 6 T. R., p. 320, and urged that the contract was a whole and entire contract to tow the *Conflict* from the Sandheads to Calcutta, and that nothing could be recovered upon the document. The tug, moreover, at the time of making the agreement, was incapable of performing what she had undertaken. If, however, the Court should be of opinion that anything could be recovered by way of indemnification for work done, independently of the agreement, the sum of Rs. 100, which had been already offered, would be amply sufficient, that sum being the difference between the Rs. 1,100 originally agreed upon and the Rs. 1,000 which the Captain of the *Conflict* had been forced to pay in consequence of the inefficiency of the tug.

Mr. Justice Wells.:—This is an action brought to recover Rs. 1,100 upon a promissory note for hire of the *Banshee* from sea to Calcutta. The substantial issue is, whether, under the document annexed to the plaint, the plaintiff is entitled to recover the sum Rs. 1,100 or any part thereof. Plaintiff's case is that a ship was seen about five miles from the outer floating light. The *Banshee* was then the only tug in the market. It does not appear from the evidence of the Captain that he made enquiry as to the power of the *Banshee*, but he had a right to suppose that a steamer offering herself was a proper vessel to tow him. According to the terms of the agreement, the Captain of the tug undertook to tow the vessel up to Calcutta. The first question is, whether the tug possessed sufficient power to tow the *Conflict* to Calcutta? Every witness, except one, has admitted that the steamer did not possess sufficient power. One of the plaintiff's own witnesses, Mr. Bensley, says: "I would not have taken the ship in tow of the *Banshee* over the James and Mary on that day." Mr. Dunbar, another witness called by the plaintiff, says that "there would have been risk in taking the *Conflict* up in tow of the *Banshee*." I do not believe that there is a single pilot in Calcutta who would have taken the vessel in tow of the *Banshee* up to Calcutta. All the witnesses called by the defendant depose to the danger of so doing, and even the mate of the tug stated that there was risk. We have, therefore, all one-sided evidence to the effect that it would have been a dangerous thing to have allowed the *Conflict* to be towed to Calcutta by the *Banshee*. I am therefore of opinion that the Captain of the *Banshee* undertook to do that which he could not perform, and that the agreement falls to the ground *in toto*. Had the case rested here, I should have given a verdict unhesitatingly for the defendant; but there is another thing to look at. The Captain of the *Conflict*, instead of dismissing the tug, remained in tow of her as far as Saugor. If he had dismissed her at once, as soon as the pilot told him that she was unfit to tow the *Conflict*, I would not have granted a single farthing. But this was not the case. The Captain of the *Conflict* chose to proceed in tow of the *Banshee* as far as Saugor Roads. I think, therefore, that I cannot do otherwise than grant a proportionate sum to the proprietor of the tug. The distance from where the *Conflict* was picked up to Saugor Roads is about two-fifths of the whole distance to Calcutta, and I therefore give a verdict for the plaintiff of Rs. 440. As there have been faults on both sides, both parties will pay their own costs.

Decree accordingly.

(Before the Hon'ble Sir Barnes Peacock, Kt., and the Hon'ble Mr. Justice Morgan.)

KISSORYMOHUN ROY vs. RAJNARAIN SEN.

Two notes are stolen from A, which B (not a bonâ fide holder for valuable consideration) tenders to C in payment for certain articles. C, not knowing B, refuses to deal with him, whereupon B brings D, who is known to C, and the purchase is made by him. Held that the part which D performed in the transaction amounted to a "conversion of the notes to his own use," and that he is liable to A.

Mr. Bell and Mr. Doyne for the appellant.

The Respondent was unrepresented.

In this case, which was an appeal from a decision of Mr. Justices Wells, it appeared that two notes of Rs. 1,000 each had been stolen from the plaintiff, and subsequently presented by a certain Bengalee in part-payment for some gold leaf which he wished to purchase. The vendor of gold leaf, not being acquainted with him, refused to have any dealings with him, whereupon the Bengalee brought a friend, who was known to the vendor of gold leaf, and sought to carry on negotiations through him. To this the vendor consented, and the friend, since made defendant, bought the gold leaf, and tendered the notes, which were duly accepted. The notes having been traced into the hands of the gold-leaf merchant, an action was brought by Kissorymohun Roy, the party from whom they had been stolen, against Rajnarain Sen, the party who paid them to the gold-leaf merchant. On the occasion of the first trial, two issues were raised—namely, first, as to "whether the notes were or were not stolen;" and, secondly, "whether or not the defendant converted them to his own use." The first of these issues was decided in the affirmative, and the second in the negative; it being held that the part which the defendant discharged in the transaction did not amount to a conversion in law. Upon this issue the question now came on for discussion in appeal.

*The Chief Justice:—*When first I came into Court this morning I was of opinion that the learned Judge who decided this case in the first instance had come to a correct conclusion, but after hearing the arguments, and examining the cases adduced by Counsel, I have changed my mind. The doctrine of conversion, so far as regards this question, is laid down in Mr. Justice Buller's *Nisi Prius*, p. 33 (a), and well illustrated by the cases of

Perkins vs. Smith (1 Wilson, p. 328) & *Parker vs. Godin* (2 Strange, p. 813). There is also another case, namely *Stephens vs. Elwall*, 4 M & S, p. 259, which was not cited in the argument, but which is strongly in favour of the plaintiff. Now, in this case we cannot enter into the relationship between the Bengalee and the defendant. It is sufficient that the defendant became indebted to the gold-leaf merchant, and discharged his debt with the notes; and I am of opinion that he converted these notes to his own use when he discharged his debt. We think therefore that the learned Judge who tried this case came to an erroneous conclusion. I must say that if I had been trying the case, without the references which have been so fully made, I should have arrived at the same result. No issue was raised at the first trial as to "whether or not the Bengalee had taken the note *bond fide* for valuable consideration;" and we do not therefore think it necessary to send the case back for the purpose of ascertaining whether the Bengalee did or did not have an actual property in the notes. The learned Judge in the first instance decided the first issue, *viz.*, "that the notes were stolen;" and we have now decided the second issue, *viz.*, "that the defendant converted them to his own use." As no other issue was raised, we are entitled to assume that the Bengalee could not have proved that he was *bond fide* entitled to the notes. We therefore reverse the decision of the lower Court, and decree that defendant pay to the plaintiff the value of the notes, with interest at 6 per cent. from the date of the commencement of the suit.

Decree reversed accordingly.

VICE-ADMIRALTY JURISDICTION.

(Before the Hon'ble Mr. Justice Morgan.)

WILLIAM PHILIP COLLOM AND OTHERS *vs.* THE SHIP "CHOWRINGHEE"

Measure of Remuneration for Salvage Services.

This was a suit to recover Rs. 20,000 for salvage services rendered to the *Chowringhee* by the promovents on the 14th and 15th of July 1863.

The Advocate-General and Mr. Woodroffe for the promovents.

Mr. Eglinton and Mr. Newmarch for the impugnants.

In this case it appeared that Mr. Collom, Captain of the *Phoenix* tug belonging to the Calcutta Steam Tug Association, observed the *Chowringhee* on the ground off Saugor Roads. The *Chowringhee* made signals of

distress; and Mr. Collom having taken the *Kenyon*, of which he was then in tow, to a safe anchorage, went to her assistance. His efforts to drag her off the first evening resulted in the loss of a hawser, but the next morning the attempt was renewed with success. The *Chowringhee* was then towed up by the *Phœnix* as far as Mud Point, where she discharged the tug, and proceeded up to Calcutta in charge of her pilot. The owner of the *Phœnix* demanded Rs. 20,000 salvage money, and Rs. 3,500 were offered by the *Chowringhee*. This offer was declined, and the result was the present action.

Mr. Eglinton for the impugnants:—No doubt in cases of salvage the Courts are inclined to take a liberal view with reference to the salvors' claims, but at the same time each case must be decided with reference to its own merits. Here, as usual, the evidence is contradictory, and in such cases the Court will consider with whom the onus of proof lies. (*The Nymph*, Evans Dig. 1862.) The tender had been refused, and it rested with the steamer to prove it inadequate. The ingredients of salvage services were well laid down by Sir John Nicoll in the *Salacia*, 2 Hag. Ad. Rep. 262. The facts proved, even on the promovent's case, did not come within that definition, and the assistance afforded by the *Phœnix* amounted to a meritorious towage only, for which Rs. 2,000, part of the Rs. 3,500 tendered, formed a sufficient remuneration. Until the return of the *Phœnix* to Calcutta, all parties had treated the service as towage; and it was clear that there had been no particular enterprize by the steamer. She had been signalled by the *Chowringhee* to take her off; and since the latter was aground, the pilot in charge of the *Kenyon*, then being towed by the *Phœnix*, was bound by the rules of the service to send the steamer to her assistance. Neither was the weather tempestuous nor the ship in any sort of distress. It was true she had taken the ground, but the evidence showed she remained upright on a mud bottom at the end of the flat, and in the then state of the weather might have so remained for days without injury to herself, as in fact had happened with other vessels which had grounded on the same spot. True, bad weather might have come on, but what the Court had to consider was the degree of impending danger at the time of rescue; and contingencies which might possibly have arisen could not properly be considered in estimating the amount of the salvage reward. The logs and other documents written at the time, and before the parties had any idea of litigation, all showed that the position of the ship was in no way critical. It

had been suggested that the *Chowringhee* was amongst breakers. The evidence, however, showed nothing but a ground swell extended beyond Middleton Point; and if the state of the river had been as represented, clearly the passing of the hawsers and other communication in small boats between the tug and the ship could not have been effected as they had. As regards the degree of labour and skill displayed by the *Phoenix*, the former resolved itself into the ineffectual effort on the evening of the 14th, terminated by the hawser breaking—a result owing apparently to her own laches, and the twenty minutes' towage on the morning of the 15th, which ended in the ship getting off. The tug remained near the ship all night, but that passive service was covered by the sum tendered. As to skill there had been none; for it appeared probable that but for the breaking of this hawser the ship would have got off on the evening of the 14th. The tug had never been in danger. At no time had she ventured above a few feet from the channel, and then with her anchor down, and had never less than three feet of clear water under her. A good deal had been said of the value of the ship and cargo, and no doubt they were worth upwards of two lakhs of rupees. The value, however, did not form the sole test as to the amount of salvage. The proportion of salvage given was greater when the value of the ship's cargo was small than where it was large (the *J. Dixon*, Evans Dig. 1860, p. 223); and the Court did not recognize the rule of proportion as imperative, but looked to the whole facts of each particular case. (The *Salacia*, 2 Hag. Ad. Rep. 263.) Upon the whole this was a case of trivial merit, for which Rupees 2,000 was sufficient reward; the balance of the Rupees 3,500 tendered being in respect of the detention of the steamer and her loss of cable. It would be proved that the ship could in any case have been got off on the 15th without the aid of the steamer by using the bower anchor. Under all the circumstances this suit should be dismissed.

The *Advocate-General*, in reply:—The simple question at issue is whether this service is one of salvage or ordinary towage. It has been called by the impugnants a slightly meritorious towage. In this case it never can be considered as having been a mere towage service, nor was it ever considered such by them until they came into Court to-day. The Captain of the *Chowringhee* states that he merely went on board the tug to find out the sum required to tow them off; that is clearly inconsistent with the pilot, who states that he told him to make a bargain, lest a salvage claim should be advanced. The

tug was taking out another vessel, and it cannot be supposed she would abandon that and go to the assistance of another for a mere towage remuneration. Moreover, of the miserable sum of Rs. 3,500 offered, the impugnants have themselves estimated Rs. 2,000 as due on the salvage. The question, therefore, is by their own conduct, apart from the general evidence, reduced to one of the amount of salvage. In the case of the *Fort George* lately decided in this Court there was not the slightest danger to the salving vessel *Colombo*. Risk and hazard to the salvors, though often one of the ingredients in a salvage claim, are not essential ingredients in a case of salvage. In *Mande and Pollock*, page 419, salvage is defined to be "the compensation allowed to persons by whose assistance a ship or boat, or the cargo of a ship, or the lives of the persons belonging to her, are saved from danger or loss in cases of shipwreck, capture, or the like." It was also laid down in the case of the *Galatea*, 4 *Jur.* 1064, that a service which originally commenced as a mere towage service may, if new circumstances arise, become a salvage service. In the case of the *Fort George* the Regulations of the Board of Trade are referred to, which intimate that steam vessels rendering salvage services should be favourably regarded. It has been said that if this and that had been done, she would have got off, but nothing is easier to speak to than the success of a manœuvre which has not been tried. If it had not been for the assistance of the steamer coming to the help of the *Chowringhee*, she must have inevitably foundered; and the reward that ought to be given to the promovents in a case like this ought to be most liberal, having regard to the admitted value of the ship, cargo (£23,000), and the extreme peril she was in when rescued by the aid readily afforded by the steamer. It had been treated as if the service in the morning and that of the previous day were distinct and separable, and that the former only being effective, nothing was to be considered regarding the latter. But in the case of the *Philanemic*, which was decided a few years ago in this Court, one-eighth of a small value was awarded for a less meritorious service performed by a steam tug. Here the damage sustained by the tug amounted to Rs. 1,300, which being deducted, the present claim would be less than one-twelfth of the value. There had never been any equivocation on the part of the tug as to a salvage claim being advanced, or tending to make the other party believe it should be treated as a towage service. In the case of the *Dream*, there was a suggestion of bad faith in this respect, and the Court found there was much reserve in making the contract. Even there the Court, though unwill-

ing to assist the promovents, awarded two per cent. At that rate even the tender is wholly insufficient. But considering the facts of this case, and the great value of the ship and cargo saved from absolute loss, although there had been probably no great risk to the salvors (which was not a necessary ingredient), the promovents' services are not to be measured by the actual work, but are entitled to a very liberal reward. The sum claimed was, on the authorities, not exorbitant. The Captain of the ship had been willing originally to leave the decision to the arbitration of Messrs. Gordon Stuart & Co., but now that danger was over a prudent and parsimonious spirit had induced the agent of the ship to endeavour to cut down the reward to the mere value of the labour expended.

Mr. Justice Morgan :—The facts of this case are reasonably certain ; and, applying the principles which determine salvage awards as laid down by Sir John Nicoll to the facts proved, I think the services rendered must be considered as salvage. Whether, however, those services are of that highly meritorious class which will induce the Court to give a large award is another question. Referring to the salvage definition of Sir John Nicoll, there is, upon the evidence, no reason to suppose danger or risk to the life of any party engaged in this transaction. Neither do I find any particular amount of enterprise to have been exhibited. Probably the master of the *Phoenix* was anxious to engage in what proved to be a profitable undertaking, and he proceeded as soon as he could to the *Chowringhee*. With regard to skill, it seems likely that the *Phoenix* would have succeeded in getting the ship off on the evening of the 21st but for the hawser breaking—an accident which seems to have resulted from the steamer putting on steam before the state of the tide properly allowed of it. Then, as to any risk which the steamer may have been put to. At one stage of the case I thought the tug had been in considerable danger. But it appears, under the circumstances of the steamer's position, and having her steam up, that the danger to her must have been but small. If necessary, her hawsers could have been cut, and use made of her engines to keep off the bank. Even in the squall, therefore, I think the steamer was not subjected to any risk. Tried, therefore, by the various tests I have referred to, the services rendered were certainly not of a highly meritorious nature. The value is, no doubt, an important element in considering the amount of salvage to be awarded, and here it is considerable. But the whole case must be looked to.

The remaining point is one upon which I have felt some difficulty—that is, the position of the ship: whether she was actually in considerable, or any peril. The evidence upon this part of the case is conflicting. My deduction from the evidence of Mr. Phipson, the pilot on board the *Chowringhee*, is, that the vessel was on the 14th in a very critical position; and whatever her master may now state as to his ability to get her off with the aid of steam, by getting out her bower anchor, it is quite clear that up to the time when she was actually taken off on the 15th no actual attempt to do so had ever been made by the parties on board. They seem to have contented themselves by signalling for assistance; and the terms of the signal itself, "Will you tow us off?" seem to imply that the parties on board the *Chowringhee* intended to ask for something more than mere towage service. The after acts of the parties on both sides seem to corroborate this view. With regard to the duration of the promovents' efforts, they must not be confined to the twenty minutes which it took to get the ship off on the 15th; but her unsuccessful efforts in the evening of the 14th, her attendance during the night, and in the early morning, and her towage to Mud Point, where she finally parted with the *Chowringhee*, must be considered. Upon the whole, I am of opinion that the services rendered were salvage services, but wanting in many of the ingredients which render such services unusually meritorious. The amount claimed by the salvors, Rs. 20,000, is certainly exaggerated. On the other hand, the amount tendered seems to me inadequate. I think that having regard to the fact that the ship was in great danger, and having regard also to the value of the vessel and cargo, the sum of Rs. 6,000 is a fair amount to award for salvage. The tender having been insufficient, the Admiralty rule will prevail, and the impugnants must pay the costs.

Decree accordingly.

JANNSEN AND OTHERS *vs.* DUNDAS AND OTHERS.

A Commission for the examination of witnesses will be issued, even though the cause is entered upon the Peremptory Board of the day, if the issuing of such Commission is not calculated to prejudice the defendants or to subject them to loss or inconvenience.

Mr. Bell for the plaintiffs applied for a Commission to Ceylon for the examination of witnesses regarding the loss of the *Nova Scotia* and the state of the cargo saved.

Mr. Paul for the defendants showed cause, contending that the application ought to have been made earlier. It had been the practice of the Court not to grant such applications on the day on which the cause was peremptorily fixed. That defendants were in many cases anxious, and in this present case were very desirous, to have the case determined without farther delay.

Mr. Justice Wells said he thought it would be a denial of justice to say that a Commission should not issue. The question to be asked was, "Would the defendants suffer by it?" In this case the action was against an Insurance Company, and no one would suffer in character by the delay. He was of opinion that the granting of the Commission was not calculated either to prejudice the defendants or to subject them to any loss or inconvenience; and that, although the application was made on the day of the cause being on the Peremptory Board, it was a matter for the discretion of the Court to grant a Commission to examine witnesses. No sufficient cause had been shewn, and the Commission would issue on the payment of the costs of the day and of the costs incurred by the postponement of the trial.

Commission issued accordingly.

HUGH, BALFOUR & CO. *vs.* EDWARD DUNDAR, KILBURN & CO.

Colourable imitation of trade-marks—Absence of fraudulent intention—Injunction granted.

This was a suit for an injunction to restrain the defendants from using trade-marks or tickets being colourable imitations of the trade-marks of the plaintiffs.

Mr. Hyde appeared for the plaintiffs,

Mr. Graham appeared for the defendants.

In this case it appeared from the affidavits that the plaintiffs, extensive manufacturers in Manchester, have been for the last ten years in the habit of exporting for sale to, and selling in, Calcutta Turkey red dyed piece-goods marked with a peculiar trade-mark which they have had in use for the last forty years. The trade-marks so employed consist of a crane in gold upon a green ground with the words "Hugh, Balfour and Co." printed over, and the word "Manchester" underneath, in the English language. A few months ago

it came to the knowledge of the plaintiffs' agents, Messrs. Gladstone, Wyllie and Co., that the defendants had imported for sale, and were selling in the Calcutta market, goods of a similar kind, but of an inferior quality, bearing a trade-mark which is a colourable imitation of that used by the plaintiffs. The only material difference between the two marks was in the words used. Messrs. Kilburn and Co. consented to receive no more goods bearing a similar mark, but declined to forego the sale of the stock in hand. Hence the present action, the object of which was to obtain a perpetual injunction against the sale.

Mr. Graham, on behalf of the defendants, referred to the case of *Burgess vs. Burgess*, 22 L. J., p. 675, and contended that no injunction ought to be granted, inasmuch as the defendants acted unwittingly and without any intention of defrauding the plaintiffs. Their affidavit shewed that they were not aware of the facts till a month before the plaint was filed. They had already consented to receive no more goods with the ticket objected to, and the plaintiffs had no right to ask for more.

Mr. Hyde for the plaintiffs urged, in reply, that the case of *Millington and Fox*, 3 Mylne and Cr., p. 33, distinctly shewed that an injunction would be granted where there was no intention on the part of the offending party to defend. In this case no intention to mislead on the part of Messrs. Kilburn and Co. was alleged by the plaintiffs, but that circumstance did not in any way affect the plaintiffs' right to the injunction prayed for.

Mr. Justice Wells :—It appears from the affidavit on behalf of the plaintiffs that Messrs Gladstone, Wyllie and Co. have acted for some years as agents of Hugh, Balfour and Co., who have been in the habit of consigning to them certain Turkey red dyed goods bearing a peculiar ticket. These tickets have become well known in the market, and are called by the natives *Hargellah* tickets. The defendants have for some months past been importing and exposing for sale, and selling in Calcutta, Turkey red dyed goods of an inferior quality, bearing a trade-mark which is a colourable imitation of the trade-mark of the plaintiffs. It must not be supposed that cases in this country are always to be decided on the same principle as those in England. Allowance must be made for difference of circumstances. The point which we have to consider here is not whether the resemblance in the tickets is sufficiently strong to mislead Europeans, but whether it is great enough to enable Native

dealers to pass off the one ticket for the other. Mr. Kilburn in his affidavit calls this a pelican ticket, while the other is a crane ticket. Setting aside the similarity of the birds themselves, their position is the same, their colour is the same, and the ground upon which they rest is the same. The only material difference is in the words, and these, Natives, unacquainted with the English language, would be unable to distinguish. I have no doubt whatever as to the one being a counterfeit of the other. I wish to state particularly that I do not for a moment attribute any intention to mislead on the part of Messrs. Kilburn and Co. Their affidavit clearly states that they were unaware of the fact till a month ago. With regard to the conduct of Messrs. Stirling and Co. of Glasgow, who consigned the goods to Messrs. Kilburn and Co., it is not very creditable. They appear to have committed an act of piracy, and to have palmed off a large quantity of their goods upon Messrs. Kilburn and Co. in an unjustifiable way. With respect to the arguments of Counsel, Mr. Hyde, who represents the plaintiffs, relied upon *Millington and Fox*, 3 Myl. and Cr., p. 33. In this case it is distinctly laid down that it is not necessary to show fraud. This principle has never been impeached; and the case of *Burgess and Burgess*, 22 L. J., p. 675, cited by Mr. Graham, so far from supporting that case of the defendants, rather upholds the view taken by the plaintiffs, for Lord Justice Turner expressly adopts the principles laid down in *Millington and Fox*. In the case of *Croft vs. Day*, 7 Beav., p. 84, Lord Langdale says that a man has no right to sell goods under forms and symbols of such a nature and character as will induce the public to believe that he is selling the goods which are manufactured at the manufactory of another person. In *Holloway vs. Holloway*, 13 Beav. 299, the Master of the Rolls laid down the same principle. I am therefore of opinion that the plaintiff has distinctly made out his case, and that he is entitled to the injunction which he asks.

Perpetual injunction granted with costs.

SIKHURCHUND AND ANOTHER vs. SOORINGMULL AND ANOTHER.

The High Court, under Letters Patent, section 12, has jurisdiction in all cases where the amount claimed is over Rs. 100, whatever may be the amount received. Persons improperly bringing suits in the High Court which fall within the jurisdiction of the Small Cause Courts may be mulcted not only in their own costs, but also in those of the defendant.

This was a suit to recover Rs. 843-12-0 for damages from the defendants, who had failed to fulfil their contract to supply the plaintiffs with 10 bales of grey longcloth, each to contain 60 pieces, at five rupees four annas and nine pies per piece.

Mr. Justice Wells said that the plaintiffs had, owing to the evidence adduced by them being defective, failed to prove that they had sustained damages to a larger amount than Rs. 75, and that he was prepared to give a verdict for that amount with costs; but before doing so he would take time to consider whether, with reference to the amount of the verdict, the Court had, under section 12 of the Letters Patent, jurisdiction to entertain the case.

On the following day accordingly His Lordship delivered judgment.

Mr. Justice Wells:—In this case as the plaintiffs failed to prove that they had sustained damages to a larger amount than Rs. 75, I reserved the question whether the High Court had jurisdiction to entertain the case. The question turns upon the construction to be put upon the exceptive clause of section 12 of the Letters Patent: "Except that it shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta in which the debt, or damage, or value of the property sued for does not exceed one hundred rupees." The words, "sued for," clearly indicate what was intended, *vis.*, to give this Court jurisdiction in all cases in which the amount claimed is over Rs. 100. It was not intended to restrict the jurisdiction of this Court to cases in which the amount recovered, whatever might be the amount claimed, is over Rs. 100. If such had been the intention, the Court would in many cases have been in this anomalous position: it would have had full jurisdiction over the case from its inception up to the very moment of giving judgment, and would then find that the conclusion at which it had arrived had the effect of depriving it of jurisdiction. I hold, with the concurrence of the Chief Justice, that I have jurisdiction in this case; and I therefore give the verdict which I originally intended to give, *vis.*, for Rs. 75 with costs.

No doubt the effect of this decision will be to enable the plaintiff in every case to claim such an amount as will give this Court jurisdiction, so that a case which ought properly to be brought in the Small Cause Court might be brought here. But it is not likely that a plaintiff who does not expect to recover so much as Rs. 500 will willingly incur the expense of coming into

this Court, when he can obtain a judgment as speedily and with less expense in the Small Cause Court. But if in any case he should be tempted to do so for any improper purpose, such as vexing or harassing the defendant, and should fail to show that he has acted *bond fide* in claiming more than he has recovered, the Court has the power, under section 187 of Act VIII. of 1859, of punishing the plaintiff, not only by depriving him of his own costs, but also by making him pay the whole or some portion of the defendant's costs. The evil, therefore, if it should arise, will find a remedy of the most effectual kind when the question of costs comes to be considered.

L. CARMICHAEL vs. BROJONAUTH MULICK & RAJKISSEN DUTT.

A payer for honour, though entitled to the same remedies upon the bill as the party for whom payment was made, is not entitled to bring a suit in his own name, and on his own behalf, for the value of the goods for which the bill was drawn.

Advocate-General for the plaintiff.

Ex parte against the defendants.

The Advocate-General applied to have the name of the first defendant struck out on payment of costs, and that he might be allowed to proceed with the case against the other defendant.

Mr. Justice Morgan :—Plaintiff sues to recover a sum of 10,365 rupees, being the amount of two bills of exchange drawn in London by David Low, and accepted by the defendant Brojonauth Mullick. The plaint alleges that the Oriental Bank, the holder of the bills, duly presented them for payment; that the said defendant did not pay, and that the plaintiff afterwards, upon protest, paid the bills for the honour of the drawer. It is further alleged in the plaint that the bills were in fact drawn by Low on Brojonauth Mullick, on behalf of himself (Brojonauth Mullick) and the other defendant, as partners in trade, in payment of goods supplied to the defendants as partners, and otherwise, on a consideration of which the defendants jointly had the benefit, and that the defendant Brojonauth Mullick accepted the bills on behalf of the partnership, although in his own name.

The defendant Brojonauth Mullick has been adjudged insolvent; and the issue of law now raised between the plaintiff and the defendant Rajkissen Dutt is whether any legal cause of action is stated in the plaint against the last-named defendant.

One who pays a bill of exchange *supra protest*, or for honour, has his action against the person for whom the payment was made, and against all others to whom that person could have resorted for reimbursement. The plaintiff who paid for the honour of the drawer Low had a clear right of suit against Brojonauth Mullick, the acceptor of the bills. But the bills being drawn on Brojonauth Mullick alone, and accepted by him in his own name, the drawer had no right of suit against the firm; for it is a strict rule that the name of the firm must be used; otherwise an action cannot be maintained against the firm, even where, a partner having signed his own name only, the proceeds were in reality applied to partnership purposes (see the cases cited in *Byles on Bills*, p. 40.) It follows that on these bills the plaintiff cannot sue the firm or the defendant Rajkissen Dutt.

The Advocate-General for the plaintiff contended that the rule by which a person who pays a bill of exchange for honour acquires the rights, and is entitled to the remedies of certain other parties, is extensive enough to authorize the plaintiff to maintain a suit against the defendant Rajkissen Dutt for the value of the goods in respect of which the bills were drawn, in like manner as Low might have done. The form of the plaint is not adapted to any such claim on the part of the plaintiff; but, assuming that this contention is open to him, and also that Low had a right to sue the defendant Rajkissen Dutt for the consideration of the bills, it appears to me that that right is vested in Low alone. I can find no authority to show that the rule of the *Law Merchant*, which confers certain remedies on the person who pays for honour, has ever been so far extended as to permit him to bring a suit in his own name, and on his own behalf, for the value of the goods for which the bills were drawn. The issue must be found against the plaintiff.

ADMIRALTY JURISDICTION.

THE "GARLAND" *vs.* THE "DRAGON."

In this case a collision had taken place at sea in the Bay of Bengal, off Juggernath Pagoda, between the Ship Garland and the Ship Dragon, both belonging to Hamburg. The Captain of the Garland claimed Rupees 18,884 damages. The owners of the Dragon disputed the jurisdiction of the Court.

Mr. Eglinton (Standing Counsel) and Mr. Wilkinson for the promovents.

Mr. Lowe and Mr. Woodroffe for the impugnants.

This was a suit promoted by the ship *Garland* against the *Dragon* in respect of a collision which took place between them in the Bay of Bengal, off the Juggernaut Pagoda, on the 18th of September last. Both ships were foreign vessels belonging to Hamburg, and the question arose whether the Court had jurisdiction to entertain the suit.

Mr. Eglington on behalf of the promovents :—As to the jurisdiction of the High Court to try this case, I submit that it has the same power as was possessed by the late Supreme Court in Admiralty and Vice-Admiralty cases. That the Supreme Court would have had jurisdiction must be admitted ; and the 31st section of the Charter establishing the High Court gives and empowers it to exercise all such civil and maritime jurisdiction as was exercised by the Supreme Court as a Court of Admiralty, or by any Judge thereof as Commissary to the Vice-Admiralty Court. The 26th section of the Charter of 1774 gives Admiralty jurisdiction to the Supreme Court with power to try and determine all causes, civil and maritime, within the limits therein specified. The other side will no doubt contend that the operation of this section is confined by the 28th section to British subjects, and gives no power to the Court over foreigners. But there are numerous cases to show that the Courts of Admiralty at home have exercised jurisdiction over foreign vessels coming within the limits of their jurisdiction. The *Johann Frederick* (1 W. Robinson's Reports, p. 36) is an authority. In that case a protest entered against the jurisdiction of the Admiralty Court in a case of collision, upon the ground that both vessels were the property of foreign owners, and that the collision occurred whilst they were in the prosecution of their respective voyages upon the high seas, was overruled. Further, the Vice-Admiralty Commission of July 1822, and also the 2 Will. IV., c. 51, section 6, clearly conferred jurisdiction upon the Supreme Court in cases like the present. By the 6th section of 2 Will. IV., c. 51, it is enacted that in all cases where a ship or vessel, or the master thereof, shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the cases (of which this is one) mentioned in the section in such Vice-Admiralty Court, notwithstanding the cause of action might have arisen out of the local limits of the Court, and to carry on the same in the same manner as if the cause of action had arisen within its limits ; and since the several powers exercised by the Supreme Court up to the period of its abolition were, by the Charter of the High Court, conferred upon the latter, the master of the *Garland* is entitled to have this suit heard and determined

here; and it is submitted that the protest against the jurisdiction of the Court should be overruled.

Mr. Woodroffe:—Whatever jurisdiction the High Court has in Admiralty and Vice-Admiralty cases, it derives from the 31st section of the Charter, the words of which are “the said High Court of Judicature at Fort William in Bengal shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said Supreme Court as a Court of Admiralty, or by any Judge of the said Court as Commissary to the Vice-Admiralty Court, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as is now vested in any Commissioner or Commissioners appointed by Us, or Our predecessors, under the powers given by an Act passed in the Session of Parliament, held in the 39th and 40th years of the reign of His late Majesty George III. for establishing,” &c. Under this section, therefore, I contend it is only empowered to try causes that arise in India, and it cannot assume a jurisdiction over matters which have not arisen here. That this was the intention of the Legislature would appear from the whole scope of the Charter. The 39 and 40 George III., c. 39, empowered His Majesty, his heirs, or successors, to issue a Commission from his High Court of Admiralty in England for the trial and adjudication of prize and other maritime questions arising in India. The words “in India” will be seen by reference to the 26th section of the old Charter to mean questions arising “in, upon, or by the sea or public rivers, or ports, creeks, harbours, and places overflowed within the ebbing or flowing of the sea, and high watermark within, throughout, and about the said three provinces, countries, or districts of Bengal, Behar, and Orissa, and all the said territories or islands adjacent thereto, and dependent thereupon,” &c. Therefore the extent of the jurisdiction under that Charter only extends to acts done on the seas between high and low watermarks.

The Court:—What words in the Charter confine the jurisdiction between high and low watermarks?

Mr. Woodroffe:—The words “in, upon, or by the sea, &c., or places overflowed within the ebbing and flowing of the sea.” This is more plainly seen to be the limit of jurisdiction by the words used in the Vice-Admiralty Commission of July 1822. These words are, I contend, equivalent to the words “in India” used in the Charter of the High Court, and the present case is therefore not legally cognizable by it.

The case of the *Johann Frederick* relied upon by the other side is distinguishable from the present. There the collision took place within British waters, and the owners of the *Delos* and the *Johann Frederick* were both foreigners and of different nations; and for the Court to refuse to exercise jurisdiction in such a case would amount to a denial of justice, since the injured parties then would have to wait until the vessel which had done the injury returned to its own country—an event which might never occur, and if she did, they might have to follow her to the most distant part of the globe. But in this case, besides the fact of the injury having been done some twenty-five miles off land in the Bay of Bengal, and not in India, both vessels belong to owners of the same country, and there will be no hardship or denial of justice, since each will return to the same port where they can have their case adjudicated upon in their own Courts. All the circumstances in the case of the *Johann Frederick* must co-exist to give jurisdiction to our Courts; it cannot therefore be regarded as an authority to govern the present case. I submit therefore, both upon the construction of the Charter, and upon the fact of the vessels being owned by foreigners of the same country, this Court has no jurisdiction.

Counsel for the promovents were not called on to reply.

Mr. Justice Levinge.:—I am clear the Court on the Vice-Admiralty side has jurisdiction in this case. The 31st Charter of the High Court gives that jurisdiction; and, sitting here as a Judge of that Court, I have the same power as the Chief Justice, as Commissary of the Vice-Admiralty Court, formerly possessed. I do not consider the section bears the construction contended for by Mr. Woodroffe. The jurisdiction is the same as that of the Admiralty Court in England. In deciding the question of jurisdiction, it is necessary to refer to the old Charter of the Supreme Court, which bore mostly, if not entirely, on the Admiralty jurisdiction, and did not touch the Vice-Admiralty jurisdiction; therefore it is not now necessary to determine the meaning of the words "high and low water." If the law stood only on that Charter, the 28th section would have the effect of confining the jurisdiction to British subjects—a view which is corroborated by the 156th section of the 33rd of George III., cap. 52, which probably does not extend the civil side of the Vice-Admiralty Court, but enlarges the jurisdiction in criminal trespasses and maritime causes. As to the meaning of the term "maritime causes" it is not necessary for me here to consider. The 39 and 40 George III., c. 79, did not direct a Commission to issue, and I have not been referred to any Act

which did. The section in that Act refers to Commissioners in "prize causes and other maritime questions arising in India," and this it is which is referred to in the 31st section of the Charter of the High Court. The Vice-Admiralty Commission was issued on the 19th July 1822, and I apprehend it is impossible to find larger words conferring authority and jurisdiction on any Court than those used in the Commission, more especially in the latter portion of it, where the words used are "with cognizance and jurisdiction of all other causes whatsoever, civil and maritime, which relate to the sea, or which in any manner or way respect or concern the sea, or passage over the same, or naval or maritime voyages performed, or to be performed, or the maritime jurisdiction aforesaid, with power also to proceed in the same according to the civil and maritime laws and customs of our said Court of Admiralty," &c. It is impossible to imagine larger powers; but to clear up all doubts as to the extent of the jurisdiction of Colonial Vice-Admiralty Courts, the 2 Will. IV., c. 51, was passed, and the 6th section declared that "where a ship or vessel, or masters thereof, should come within the local limits of any such Court, it should be lawful for any person to commence proceedings in any of the suits therein mentioned, namely, for seamen's wages, pilotage, bottomry, damage to a ship by collision, &c., notwithstanding the cause of action might have arisen out of the local limits of such Court." Under that statute I am of opinion that this Court has jurisdiction to try the maritime causes of any ships, whether foreign or British, wherever the cause of action may have accrued, provided the ships come within the jurisdiction of this Court. In this view I am justified by the decisions of the Courts in the cases of the *Johann Frederick* (1 W. Rob., p. 35), *Cope v. Doherty* (4 K. and J., p. 367), the *Wild Ranger* and the *Diana*, both reported in 32 Law J., N. S., Ad. Ca., p. 45, p. 57. In the two former cases the vessels belonged to foreign owners, and in *Cope vs. Doherty* they were both American vessels. The collision did not take place within the local limits of the Court; yet the jurisdiction was upheld by both the learned Judges who tried the cases. In the *Wild Ranger* the question of jurisdiction was not doubted. There is no limitation of jurisdiction in favour of foreign vessels for damage sustained on the high seas, and the Court will exercise jurisdiction whenever they come within its limits. The case of the *Diana* quoted by Mr. Woodroffe is very much in favour of the jurisdiction. In that case a collision occurred between two British vessels in Dutch waters, and the Court held that it had jurisdiction. The accident occurring within three miles of the coast has nothing to do with the question. (See the case

of the *Saxonia*, 31 Law Jour., N. S., Ad. Cas., p. 201.) I am of opinion that whether this accident happened in the middle of the Bay of Bengal or within three miles of the coast is immaterial; for if the vessels afterwards came within the local limits of the jurisdiction of the Court, they became liable to it. It would be a very oppressive rule, indeed, to exclude foreigners from prosecuting these claims in our Courts, and oblige them to take proceedings *in personam*; so where there is a Court competent to exercise jurisdiction it will do so; nor is there any hardship in this, for the British law is not enforced on foreigners: they only become subject to the *Lex fori* and not to the *Lex loci*. (See *de la Vega vs. Vianna*, 1. Bar. & Ad. 285.) I therefore rule that this Court has jurisdiction, and I shall proceed to try the case.

BHOYRUBCHUNDER DOSS AND SREEMUTY BEMULMONEY DOSSEE

vs.

MADHUBCHUNDER PARAMANIC AND OTHERS.

A Hindoo woman may at all times sue either alone or jointly with her husband.

The Court has power to strike out of a plaint parties improperly introduced.

Mr. Reed for plaintiffs.

Advocate-General, Mr. Eglinton, and Mr. Lowe for defendants.

This was an action brought by the plaintiffs, husband and wife, against the defendants for an alleged assault upon the wife.

On the part of the defendants it was contended that, independently of the merits of the case, the suit ought to be dismissed, inasmuch as the husband was wrongly joined with the wife, who, being a Hindoo woman, ought to have sued singly.

Mr. Justice Levinge said that two points were raised in this case—namely, (1) whether in an action for assault upon a Hindoo wife it is improper to join the husband as plaintiff; and (2) whether it is competent to the Court, at the hearing of a cause, to strike out of the plaint the names of parties improperly introduced. He had considered the matter carefully, and was of opinion that there was really nothing in either objection. It was perfectly true that a Hindoo wife had an undoubted right to bring an action alone, and to recover damages. That position was expressly recognized in Macpherson's Code of Civil Procedure, p. 13, where it was said that a "Hindoo or Mahomedan woman is at all times competent to sue as if she were unmarried, even to sue her husband." That circumstance, however, did not preclude a husband from joining his wife as plaintiff, which he had a right to do upon two grounds: first, upon the ground of public policy; and, secondly, because the husband had a claim upon any damages which the wife might recover. That fact was clearly laid down in *Shamachurn's Digest* (Vol. II., p. 758). He therefore thought that the husband was not improperly joined. As to the second point, he was of opinion that the Court had power to strike out of a plaint parties improperly introduced. To hold otherwise would be to defeat the ends of justice.

The case was then heard upon its merits, and a verdict given for the defendants with costs.

Decree accordingly.

CRIMINAL JURISDICTION.

REGINA *vs.* GOLUCK DOSS.

The Court has no power to dispose of fines inflicted upon prisoners. Such power exists in Government alone.

Mr Lowe for the prosecutor.

The Advocate-General for the Crown.

In this case a fine of Rs. 1,000 had been inflicted upon one Goluck Doss, who had been found guilty of stealing certain articles belonging to the prosecutor. A rule *nisi* was obtained by Mr. Lowe, the prosecutor's Counsel, calling upon the Crown to show cause why the prosecutor should not be indemnified out of the fine imposed. The question having been fully discussed by the Advocate-General on the one side, and Mr. Lowe on the other, His Lordship delivered judgment as follows :

Mr. Justice Morgan.:—I do not think I have power in this case to make the order asked for, which is that prosecutor may be allowed compensation for the property stolen from him out of the proceeds of a fine imposed on the prisoner as part of his sentence, and since levied. By the Charter of the Supreme Court all fines were reserved to the king, but the 29th section of the Charter, and the Statute 9 Geo. IV., c. 74, s. 52, empowered that Court to compensate prosecutors out of fines levied by or transmitted to the Court. In 1851 Her Majesty granted by Letters Patent to the East India Company, and their successors, all amercements, fines, and penalties, reserving by a proviso the power of the Supreme Court to make satisfaction to prosecutors out of fines. By the Statute 16 and 17 Vic., c. 95, s. 27, it was enacted that all fines and penalties incurred by the sentence or order of any Court of Justice within the territories under the government of the East India Company, and all forfeitures for crimes, &c., "shall (as part of the revenue of India) belong to the East India Company in trust for Her Majesty for the service of the Government of India." Then follows a proviso empowering the Government to make any grant or disposition of the property to any relative of the person from whom it may have accrued, or to any other person or persons. By the Statute 21 and 22 Vic., c. 106, s. 39, all rights to fines, penalties, and forfeitures which the East India Company then had were "vested in Her Majesty, to be applied and disposed of, subject to the provisions of this Act, for the purposes of the Government of India."

By these two statutes all fines are transferred absolutely to the Government, and the right to grant or dispose of them is now, it seems to me, in the Government alone. The power given to the Supreme Court by the Charter and Act above cited, and expressly reserved by the proviso in the Letters Patent of 1851, is not noticed in the later laws, and must, in my opinion, be deemed to be abrogated. At least the effect of the later legislation on the powers given by the Charter is to render the present existence of that power so doubtful, that I decline to make the order asked for.

SHAIK DHAUNSEE

vs.

THE INDIA GENERAL STEAM NAVIGATION COMPANY, LIMITED.

One of the defendants' flats, while carrying certain hides belonging to the plaintiff, struck upon a projection imbedded in the river, and was lost. The bill of lading contained the following exceptions; viz.: "Difficulties or casualties of navigation, and all and every danger and accident of the river and navigation whatsoever." An action being instituted to recover the value of the hides, it was held (1) that the casualty fell within the words of exception, and (2) that, considering the enormous risks incurred in the navigation of the river, the words were not unreasonably large.

In this case 43 bales of hides had been shipped on board one of the defendants' flats. When shipped the hides were in good order, but on their arrival in Calcutta they were found to be very seriously damaged. The plaintiff thereupon refused to take delivery, and instituted the present action to recover the value, alleging that the damage arose from the negligence of the defendants. The defendants, on the other hand, maintained that the damage had been caused by the casualties of navigation, from liability in respect to which they were expressly exempted by the exceptions contained in the bill of lading.

Mr. Eglinton for the plaintiff.

Mr. Graham for the defendants.

Mr. Justice Wells:—It appears that a contract was entered into between the plaintiff and defendants as evidenced by the bill of lading. The contract turns upon the words "difficulties or casualties of navigation, and all and every danger and accident of the river and navigation whatsoever." The learned Counsel for the plaintiff does not contend that the accident in this case is not

an exception within these words, but he objects to the words as being too large. Considering the enormous risks incurred in the navigation of this river, and from which it was the object of the Company to protect itself, it cannot be said that the contract is unreasonable in its terms, and ought not to be upheld. It would probably be ruinous to any company to undertake all risks in navigating such a river as this. The Company has no monopoly, and there is nothing to prevent it from exercising the right which it possesses in common with every mercantile company of making such terms as it may think fit with a view to its protection. The Company would not have taken the plaintiff's goods except upon the terms contained in the contract; and the plaintiff, having entered into the contract with a full knowledge of its terms, is bound by the whole contract, and cannot be allowed to object to any part of it. If he felt the terms stringent, it was open to him, as it is to any other person under similar circumstances, to protect himself by insurance; and if he has not done so, he has himself to blame for the loss he has sustained. The Captain says the flat in which these hides were was lashed alongside the steamer; that there was the same quantity of water under the flat as under the steamer; and that the flat was struck by some projection embedded in the river, which cut through one of the iron plates. I am clearly of opinion that this casualty is comprised among the exceptions which protect the Company, who are therefore entitled to a verdict. I think it right to observe that it entails great hardship on a company to be brought into Court, without any endeavour on the part of the plaintiff to examine into the circumstances of the case previous to instituting his action.

Decree accordingly.

;

J. G. BAGRAM, EXECUTOR OF G. M. GASPER

vs.

O. MOSES AND E. GASPER.

Although the High Court in its Original Jurisdiction has no jurisdiction over land or other immoveable property situate beyond the limits of Calcutta, and can make no adjudication of the right and title to such land, yet where a party is personally subject to the jurisdiction, the Court has power to declare whether or not such party holds such land subject to a trust.

When an objection to the jurisdiction is first taken at a late stage of the suit, instead of being brought forward, as it should be, at the first stage of the suit when

the plaint is presented for admission, the proper course is, even if the jurisdiction be doubtful, to proceed to determine the suit.

Mr. Bell and Mr. Newmarch for the plaintiff.

Mr. Doyne and Mr. Lowe for the defendant O. Moses.

Mr. Wilkinson for the defendant Mrs. E. Gasper.

Mr. Justice Morgan.—The plaintiff sues as executor of Gasper Malcolm Gasper. The plaint states that in 1846 the defendant Moses received a sum of money from Gasper Malcolm Gasper for the purpose of purchasing for him certain property; that the defendant with part of the money bought the property, which was afterwards conveyed to him in his own name; that he has lately refused to acknowledge himself as a trustee for G. M. Gasper or the plaintiff; and the relief asked for is that the defendant may be declared to be a trustee for the plaintiff as executor, that he may be compelled to convey the property to the plaintiff, and to pay him the residue of the money received from G. M. Gasper.

The property purchased was the reversionary interest of one Balthazar Gasper in a house at Garden Reach. Balthazar Gasper has been declared insolvent, and this property was purchased by the defendant with a part of the money advanced by G. M. Gasper. The defendant says that the intention was to settle the property for the benefit of the wife and child of Balthazar Gasper, and that G. M. Gasper advanced the money "on condition of the said sum being refunded to him upon the premises coming into possession. The defendant also relies on the law of limitation as a bar to the plaintiff's claim in respect of the money not expended in the purchase of the property, which money, the defendant states, was given or advanced as a loan by him to Balthazar Gasper with the sanction of G. M. Gasper.

At the hearing of the suit on the 22nd of May last, the question was fully argued, whether a binding trust in favour of the wife and child of Balthazar Gasper had been created and declared. The case was then adjourned in order that Mrs. Gasper and her child, who were not before the Court, might be made parties to the suit under the 73rd section of the Code of Civil Procedure. Mrs. Gasper has appeared (the child is not now alive); and in a written statement filed by her, she objects that the heir at law of G. M. Gasper, and not the plaintiff, who is his executor, is the proper person to maintain this suit. At the adjourned hearing another objection was taken on her behalf, *viz.*, that the property in dispute (the reversionary interest in a

house at Garden Reach) not being situate within the local limits of the Court's jurisdiction, this Court was not competent to hear and dispose of the suit.

I have read the will, and am of opinion, having regard to the whole of its provisions, that the plaintiff, and not the heir at law, is entitled to bring this suit. Upon the question of jurisdiction which has been raised by Mrs. Gasper's Counsel in this late stage of the suit, I think it sufficient to say that though the Court has no jurisdiction over land or other immoveable property situate beyond the limits of Calcutta, and can make no adjudication of the right and title to such land, yet, inasmuch as the defendant Moses is personally subject to the jurisdiction, this Court has power to declare, as is prayed by the plaint, that the defendant holds the property subject to a trust. Even if the jurisdiction is doubtful, I think the proper course is, when the objection is first taken at a late stage of the suit, instead of being brought forward, as it should be, at the first stage when the plaint is presented for admission, to proceed to determine the suit.

The evidence bearing on the chief question in this suit, which is, whether or not a valid trust for the benefit of Mrs. Gasper and her child was created, is briefly to the following effect. The purchase-money belonged to G. M. Gasper, who by the intervention of others paid it to the defendant to effect the purchase. The defendant gave a receipt to G. M. Gasper for the money, in which it is expressed that the money is received "for purchasing on his (G. M. Gasper's) account" this property. Within a few weeks after the purchase, Mr. G. M. Gasper's Solicitor forwarded to the defendant, who had taken an absolute conveyance to himself from the Official Assignee, the draft of a conveyance by the defendant to G. M. Gasper. The defendant declined to execute this deed, writing thus in answer to the Solicitor's request: "Where is the trust-deed? Unless that is executed, I can't execute this conveyance." Mr. Carrapiet, the Solicitor of G. M. Gasper, answered: "The interested parties are not desirous that the settlement should be immediately prepared. They are willing, and wish that everything should be left to Gasper, who has promised to have the settlement prepared by and by." The defendant still declined to convey to G. M. Gasper.

The defendant was not again applied to until the year 1862, when Mr. G. M. Gasper, shortly before his death, requested the defendant by letter to convey the property. On this occasion the defendant proposed to meet Mr. Gasper to make some communication to him on the subject. Before any meeting, Mr. Gasper died.

The defendant, on his examination, deposed that the property was purchased for the benefit of B. Gasper's wife and child ; that although there was no writing to this effect, it was understood between the uncle, Balthazar Gasper, who was a poor man, and his nephew, G. M. Gasper, who was rich and inclined to assist the former. The defendant admits that he had no direct communication with G. M. Gasper on the subject of the settlement for the benefit of B. Gasper's wife and child ; and he further states : " All I heard was from what was told me by Balthazar Gasper and Mr. Malcolm Gasper, the father of G. M. Gasper." The defendant has never been required by Balthazar Gasper, or by Mrs. Gasper, to execute any declaration of trust in favour of the latter.

Although there are indications of an intention on the part of G. M. Gasper to create some trust for the benefit of his uncle's wife and child, I think the evidence fails to establish the creation of any valid trust binding on him or his representative ; and as there is no equity in the Court to protect or assist an imperfect gift or trust, I must hold that no trust has been declared for the benefit of Mrs. Balthazar Gasper or her child, and that the defendant is a trustee for the plaintiff as the representative of G. M. Gasper. There must be a decree to this effect. The balance of the money received by the defendant in 1846 from G. M. Gasper was expended, the defendant states, for the benefit of Balthazar Gasper. Until the commencement of the present suit no claim has ever been advanced by G. M. Gasper, or on his behalf, for any money due to him or to his estate from the defendant, in respect of the sum of money received by him from G. M. Gasper in 1846. Whatever was the precise object for which that sum was received by the defendant, it may be presumed to have been long since accomplished.

The decree will be for the plaintiff, so far as he seeks to have it declared that the defendant is a trustee for him as executor of G. M. Gasper. As the defendant was justified under the circumstances in declining to act, except under the Court's direction, he is entitled to his costs of suit.

Decree accordingly.

CAMPBELL AND OTHERS *vs.* KEITH AND OTHERS.

Plaintiffs must, on the presentation of their complaints, produce in Court the originals of the documents relied on by them in support of their claim.

When a plaintiff can satisfy the Court at the hearing that some document on which he desires to rely was not presented with the plaint, because he was ignorant of its existence at the time, the Court will probably allow it to be received as evidence.

Mr. Eglington, on behalf of the plaintiffs in this case, applied for an order that they be at liberty to produce the original papers, accounts, and documents when the cause came on for settlement of issues, instead of, as is usual, on presentation of the plaint.

It appeared that the plaintiffs are merchants at Bombay, where the documents in question, forming a correspondence of very great length, were; and it was submitted that although, under the first paragraph of section 39 of the Civil Procedure Code, it seemed imperative upon a plaintiff to produce the documents on which he relied, on presenting the plaint, yet that, under the circumstances and to avoid delay, the plaint might be filed in the first instance without having the documents attached to it, and that the documents might be received in evidence at the hearing of the cause, under the discretionary power vested in the Court in the last paragraph of the section alluded to.

Mr. Justice Wells:—I am of opinion that the plaintiffs must, on presenting their plaint, produce in Court the originals of the documents relied on by them in support of their claim. I have no discretion in the matter. The terms of the Act are imperative, and not permissive, that on the plaint being presented, any written document relied on by the plaintiff as evidence of his claim must be produced. The provision is a wise one, especially with reference to the administration of justice in this country. It is intended to tie parties down to the case they make when they first come into Court, and I altogether adhere to the views on the subject which I expressed some time ago. In the present case it is said that the application is obviously *bona fide*, and to avoid delay, which is very probably the case; but I am bound by the wording of the Act, and cannot therefore treat the question as one of expediency, one consequence of doing which would probably be to have the Court inundated with applications of a similar nature. A suggestion was made that the plaintiffs might present their plaint, making no production of the documents relied on, and that when the cause came on for hearing, an application might be made to the discretion of the Court under the last paragraph of the 39th section to admit the correspondence to proof,

which, under the circumstances, the Court would allow. Of course, it is open to the plaintiffs to adopt that course if they choose; but I am quite clear that, under the circumstances, I should not allow the documents in question to be given in evidence. It appears that they are at Bombay, and the parties there representing the plaintiffs, who must be supposed to know the Act, should have forwarded them with the other papers they have sent here for the purposes of the suit. Where a plaintiff can satisfy me at the hearing that some document on which he desires to rely was not presented with the plaint, because he was ignorant of its existence at that time, or in any similar case, I would probably allow it to be used in evidence, but the facts here are very different, and this application must consequently be refused.

Application refused accordingly.

TOYLUCKMOHUN TAGORE AND ANOTHER *vs.* GOBINCHUNDER SEN.

Construction of Act VI. of 1855.

Mr. Doyne and Mr. Woodroffe for plaintiffs.

The Advocate-General and Mr. Eglinton for defendant.

In this case the plaintiffs were mortgagees of a zemindary called Pergunnah Sundip, Turruff Bhobanychurn, in the zillah of Bhoolooah, and of a certain other zemindary called Mehal Nayabad, Turruff Joynarain Ghosaul, Pergunnah Islamabad, in the zillah of Chittagong, under and by virtue of an indenture of mortgage bearing date the 26th of September 1859, and made and executed to secure the repayment of the sum of Rupees 25,000, with interest at six per cent. per annum, between Sreemutty Bamasoonderee Dabee and Sreemutty Soroseballa Dabee, the legal representatives of one Shamloll Tagore, deceased, of the first part, the plaintiffs of the second part, and Robert O'Dowda, a jurisdiction trustee, of the third part; and by a certain other indenture of transfer dated the 16th of May 1860, and made between the plaintiffs of the first part and the defendant of the second part and William F. Watson, a jurisdiction trustee, of the third part, the said mortgaged premises and the said mortgage-debt were conveyed and assigned by the plaintiffs to the defendant by way of mortgage, subject to the redemption, on payment to him by the plaintiffs, or either of them, of the sum of Rupees 10,900, and interest at the rate of 12 per cent. per annum, on the 15th day of February 1861. That the plaintiffs by a deed of further charge on the said premises dated the 13th day of October 1860, and subject to the like proviso for redemption as was contained in the deed of the 16th day of May 1860, secured to the defendant repayment of

the further sum of Rupees 1,200, with interest at 12 per cent. per annum, on the 15th day of February 1861. That the plaintiffs made default in the repayment of the said principal sums of Rupees 10,900 and Rupees 1,200, and interest, on the said 15th day of February 1861, but were now desirous of being let in to redeem their rights and interests under the first-mentioned indenture of mortgage, and for that purpose had made an application to the defendant in writing for the reconveyance to them of the said mortgaged premises and mortgage-debt, on payment of what was due to the defendant thereon, but without success.

The plaintiffs put in a written statement, from which it appeared that both the sums advanced by the defendant were further secured by a bond and warrant of attorney, under which judgment was entered by confession; and that the defendant subsequently sued out a writ of *fiery facias*, under which the Sheriff put up for sale, and sold, and conveyed to the defendant as the highest bidder, the right, title, and interest of the plaintiffs in the mortgaged premises.

Mr. Justice Wells.—In this suit the plaintiffs claim to be entitled, as mortgagors, to redeem certain property mortgaged by them to the defendant, on payment of principal, interest, and costs due on their mortgage. It appears from the bill in a former suit instituted on the Equity side of the late Supreme Court by the present defendant against the now plaintiffs and the original mortgagors of the premises, and to which both parties have referred, as containing a correct statement of the facts, that the original mortgagors executed an indenture of mortgage, dated 26th September 1859, to secure to the plaintiffs in the present suit the sum of 25,000 rupees advanced by them to S. M. Soroseballa Dabee and S. M. Bamasoonderee Dabee. The money was advanced on a certain term which was not to expire till 1869, a circumstance which has to a certain extent influenced my judgment, as showing that a considerable interest remained in the plaintiffs. By an indenture of conveyance and transfer dated the 16th May 1860, and made between the plaintiffs and defendant, there was a conditional transfer of the mortgage of the 26th September 1859, and of the plaintiffs' rights therein to the present defendant for the purpose of securing to him repayment of the sum of Rs. 10,900 advanced by him to the present plaintiffs, and a further sum of Rs. 1,200 afterwards advanced upon the same security by a deed of further charge dated the 13th October 1860. Default was made in the payment of both sums by the plaintiffs, and so things remained for a short time. A most improvident proviso was inserted in the deeds of transfer and of further charge, the words

of which are : " But if default shall be made in payment of the said sum of Rupees 10,900 and interest thereon, and other moneys as herein aforesaid at the time hereinbefore appointed for the payment of the same, then, and in such case, the right, title, and interest of the said Sreemutty Dukinamoye Dabee and Toyluckmohun Tagore in and to the said mortgage-debt, or sum of Rs. 25,000, and interest thereon, and all and singular their or his powers, remedies, claims, and demands whatsoever, under and by virtue of the said recited indenture of mortgage, shall cease and determine; and it shall be lawful for the said Gobindchunder Sen, his heirs, executors, representatives, and administrators to sell, assign, transfer, or otherwise dispose of the said mortgage-debt, and all the right, title, and interest of the said Sreemutty Dukinamoye Dabee and Toyluckmohun Tagore, under the said indenture of mortgage, in such manner and for such consideration as he, the said Gobindchunder Sen, his heirs, executors, administrators, or assigns shall think fit or expedient." The proviso is which has been raised against the plaintiffs' equitable rights; but in England I think the Courts of Equity would have given relief to the plaintiffs, notwithstanding that proviso, and the same would probably have been the case here but for Act VI. of 1855; for it is impossible not to see that the plaintiffs must, unless they succeed in this case, lose not only the difference between the sum advanced by them to the original mortgagors and the smaller sums advanced to them by the derivative mortgagee, but also their equitable interests under the mortgage which has been sold by the Sheriff for the sum of Rs. 4,500. It is important to consider what it was that the Sheriff sold. He sold, beyond all doubt, the right, title, and interest of the plaintiff, or, in other words, his equity of redemption; and it is not a little curious that the words in the third clause of sec. 1 of Act VI. of 1855 are the very words used in the proviso I have already referred to. In fact, it would seem as if the conveyancer had the words of the Act in view when drafting that clause. The peculiar effect of the statute was pressed upon the attention of the Court by the defendant. At that sale the defendant purchased the right, title, and interest of the plaintiffs; and though it was contended by the plaintiffs' Counsel that a mortgagee should not without leave purchase his mortgagor's equity of redemption, so as to extinguish the equities existing between them, yet, in my opinion, there is nothing wrong in such a proceeding; for in many cases, without such intervention by the mortgagee, the property would go for nothing. Clause 1, section 1, Act VI. of 1855, is as follows: " Under any writ of *fieri facias* issued out of any of Her Majesty's Supreme Courts, on any side of the Court, may be seized and sold any lands,

houses, or other immoveable property of the party against whose effects such writ issues, whether his estate or interest therein be legal or equitable." This clause shows that the statute is designed for the benefit of creditors, and that it authorizes the sale of the equitable as well as legal rights of judgment-debtors; and under this clause, therefore, an equity of redemption is a kind of property that might be seized and sold. Clause 3 is as follows: "If the lands, houses, or other immoveable property liable to be sold under such writ be in the possession of any person other than the judgment-debtor, the Sheriff shall not seize such property; but shall sell and convey all the right, title, and interest of the debtor, and such conveyance shall pass the same interest to the purchaser as if the same had been executed by the debtor." No words can be clearer than these. It is not for me to say how this Act may have operated with reference to the equitable rights of parties. My duty is simply to decide according to the law as it exists; and, in my opinion, when the Sheriff, acting under section 3 of the Act, sells and conveys the right, title, and interest of a mortgagor, the effect of such a conveyance is precisely the same, as if it had been executed by the mortgagor himself. The fact of an interest so conveyed proving afterwards to be of greater value than the price paid for it would make no difference; for it would be idle to contend that a mortgagor who had sold and conveyed his equity of redemption could the next day avoid the conveyance, on the ground that he had since discovered that he had sold at an undervalue. He would be stopped by his conveyance; and a conveyance by the Sheriff under the Act would operate similarly. Of course, any conveyance may be got rid of if fraud be established; but there is no question of fraud in this case. Mr. Woodroffe says that, looking at the preamble of the Act and the Act itself, it is clear the Legislature never intended to defeat the existing equities of parties; that its scope and design is merely to facilitate the satisfaction of debts, by rendering equitable as well as legal interest liable to seizure; and that, at all events, this Act does not give a purchaser affected with notice, or standing in the position which the defendant occupies, a title freed from the known equities previously attaching thereto, and therefore that it does not affect the equitable right of his clients. But this Act overrides all equities, and, so far as I see, makes no distinction between purchasers with notice and those without. I cannot say, in the face of this Act, that the plaintiffs' right was not transferred to the defendant by the Sheriff's sale and conveyance. I think such sale and conveyance operated to divest the plaintiffs of their entire rights, equitable as well as legal. They might have

come in under section 2 of the Act, and prevented the sale, but they have allowed two years to elapse without doing anything. Apart from the Act and any special circumstance which might stand in the way of their equitable claim, the plaintiffs would probably have succeeded in this suit; but as this case must be determined under the Act, it is unnecessary for me to express any opinion as to what might have been the position of the parties under a different state of the law. I find the issue for the defendant, and dismiss the suit with costs.

Decree accordingly.

Note.—This decree was reversed on appeal, it appearing upon further evidence that the Sheriff had sold the mortgage-debt without seizing it, and without giving notice to the debtor as required by clauses 3 and 5 of sec. 1 of Act VI. of 1855; but the judgment as regards the construction put upon Act VI. of 1855 was not disturbed.

NOWRJEK NUSSERWANJEE AND ANOTHER *vs.* JOHANNES AVDALL AND ANOTHER.

A party having two tugs, A and B, undertakes to supply tugs to two vessels, P and Q, in the order of their engagements as soon as the tugs are free. A is first free, and tows P, which has the prior claim, to Diamond Harbour, where she becomes disabled. B subsequently tows Q, and finding A disabled at Diamond Harbour leaves Q and tows P out to sea, returning subsequently for Q. Held that B was not justified in leaving Q, but that she ought to have towed her out to sea without interruption.

Mr. Bell and Mr. Wilkinson for plaintiffs.

Mr. Eglinton and Mr. Hyde for defendants.

This was a suit to recover the sum of Rs. 1,673 said to be due from the defendants to the plaintiffs on account of damages sustained by 7 days' demurrage and the loss of an anchor and cable.

The plaintiffs were merchants in Calcutta, and the defendants were the proprietors of several tugs. The plaintiffs made an agreement with the defendants for the towage of a vessel named the *Pearl* from Garden Reach to Saugor. The terms of agreement were as follows: "Engagement Rs. 700 from Garden Reach to Saugor Anchoring Buoy. Vessel to be ready at daylight. The engagement to be subject to the conditions and regulations which we hereby subscribe." In the Rules and Regulations so subscribed was contained the following clause: "Priority of claim to a steamer is given in the order of application, when the party applying has determined the date on

which he requires the steamer, and subscribed to the printed engagements annexed to the Regulations."

The plaintiffs named the 14th as the day upon which the *Pearl* would be ready to start, but no tug appeared to tow her. She accordingly lay two days at her moorings, and on the 16th was taken in tow by the *Banshee*. The *Banshee* towed her to Diamond Harbour, and there left her for the purpose of towing another vessel, which had been towed to that place by another of the defendants' tugs, the *Vulcan*, which became disabled. The *Pearl* was detained two days in consequence, at the expiration of which time the *Banshee* reappeared and towed her to sea. It appeared clearly in evidence that up to the 16th none of the defendants' tugs were free from engagements prior to that with the plaintiffs, and also that the loss of the anchor and cable was not in any way due to the defendants. The main question at issue was how far the *Banshee* was justified in leaving the *Pearl* to take the other vessel in tow, the application for towage on the part of the other vessel having been made prior to that of the *Pearl*.

Mr. Justice Wells.—In this case there is no ground whatever for supposing that the loss of the anchor and cable was due to the *Pearl* being deserted by the tug, and I am glad that the plaintiffs have saved me the trouble of an adverse decision in regard to that part of the case, by abandoning their claim. As regards the demurrage, the plaintiffs have no right under the agreement until the 16th, when the *Banshee* was free. Up to that date the defendants' tugs have all been satisfactorily accounted for, and the Court has to consider only the events which took place subsequent to that date. The learned Counsel for the defence have argued that the *Banshee* had a right to take the ship in tow which the *Vulcan* was forced to abandon; but I am of opinion that the argument is untenable, and that the plain duty of the *Banshee* was to have had regard only to her own first engagements, and to have towed the *Pearl* out to sea as soon as they had expired. The evidence shews clearly that two days were lost in consequence of the neglect of the Captain of the *Banshee* so to do, and I am therefore of opinion that the plaintiffs are entitled to two days' demurrage on account of the time so lost. There will, therefore, be a verdict for the plaintiff to the amount of Rs. 400, and the parties will pay severally their own costs.

Decree accordingly.

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OF

PRINCIPAL MATTERS.

ACT.

The meaning of an Act is to be gathered solely by reference to the Act itself. *Muddoosooden Dey vs. Bama-churn Mookerjee*, p. 100.

The only enactment in relation to civil procedure now in force besides Act VIII. of 1855, and the Acts modifying such Act, are Act XVII. of 1852 and a part of Act VI. of 1854.

A claim to property under section 246 of Act VIII. of 1859 is virtually a suit for land. *Sagore Dutt vs. Ramchunder Mitter*, p. 136.

Section 98, Act VIII. of 1859, is applicable only to Mofussil Courts. *Barrow vs. Pollock*, p. 149.

Construction of Act VI. of 1855. *Toyluckmohun Tagore and another vs. Gobinchunder Sen*, p. 289. :

ANCESTRAL PROPERTY.

A, one of four brothers in joint possession of ancestral property, separates himself in food, worship, and estate, leaving his three brothers jointly possessed of their undivided three-fourth shares. A dies unassociated, leaving a son and heir, B. The three brothers continue and die associated, two without heirs, and the third leaving a son and heir, C. B has no claim to any part of the undivided three-fourth shares as against C, who takes the whole absolutely. *Jadubchunder Ghose vs. Benod-berry Ghose*, p. 217.

APPEAL.

The High Court sitting in appeal on questions of fact is guided by the same rules as those of the Privy Council when they sat upon motions for a rule for new trials from the old Supreme Court.

The High Court sitting in appeal will not disturb a judgment upon a question as to the credibility of witnesses, unless it be manifestly clear from the probabilities attached to certain circumstances in the case that the Court was wrong in the conclusion drawn from such evidence.

The High Court sitting in appeal will look upon the decree of a Judge as to facts in the same light as the verdict of a jury; and though some of the reasons given for the conclusion arrived at be erroneous, the High Court in appeal will not say that the decree is against the weight of evidence, if sufficient reasons for such decree still remain. *Heeralall Chuckerbutty vs. Mohes Chunder Ghosaul*, p. 105.

A Court of Appeal cannot refer to the evidence in another case, or act upon the impression made by it upon the Court below.

The rule of the Privy Council not to disturb a judgment of a Court in India upon a question of fact, unless it is clear from the probabilities of the case that the judgment is wrong, however necessary as regards a Court of Appeal

far removed from India, would hardly be extended, as one equally necessary and applicable, with the same strictness to a Court of Appeal in India. *Saroda-soondery Dossee vs. Tincowry Nundy*, p. 223.

ARREST.

A Government brig employed in supplying pilots to vessels at the Sand-heads was arrested under proceedings *in rem*. Held that the brig by 21 and 22 Vic., c. 126, had become the property of the Crown, and as such was entitled to the same exemption from arrest as all other Queen's ships, and that the proceedings *in rem* were therefore illegal. *Brown vs. Ship Kedgerie*, p. 253.

ASSIGNMENT.

An assignment made *bond fide* and for valuable consideration, before execution put in and without notice of claim of execution-creditor, held not to be void under Statute 13 Eliz., c. 5. *Tarrucknauth Paulit vs. Gladstone*, p. 178.

A joint debt cannot be amalgamated by a colourable assignment with a personal debt so as to give the assignee the right to sue in respect of both debts. *Sreehurry Paul vs. Nilmoney Sen*, p. 169.

ATTORNEY.

If a client places himself in the hands of an attorney, he places himself in his hands in regard to all matters having connection with the suit, and the attorney must be held liable for any negligence, even though his client do not take prompt action in the matter. *Madarod Bahadoor vs. William Anley*, p. 137.

BILL OF EXCHANGE.

A payer for honour, though entitled to the same remedies upon the bill as the party for whom payment was made, is not entitled to bring a suit in his own name and on his own behalf for

the value of the goods for which the bill was drawn. *Carmichael vs. Brojo-nauth Mullick*, p. 274.

BILL OF LADING.

One of the defendants' flats, while carrying certain hides belonging to the plaintiff, struck upon a projection imbedded in the river, and was lost. The bill of lading contained the following exceptions, viz.: "Difficulties or casualties of navigation, and all and every danger and accident of the river and navigation whatsoever." An action being instituted to recover the value of the hides, it was held (1) that the casualty fell within the words of exception; and (2) that, considering the enormous risks incurred in the navigation of the river, the words were not unreasonably large. *Shaik Dhaunsee vs. The India General Steam Navigation Company, Limited*, p. 283.

COMMISSION.

A Commission for the examination of witnesses will be issued, even though the cause is entered upon the Peremptory Board of the day, if the issuing of such Commission is not calculated to prejudice the defendants or to subject them to loss or inconvenience. *Jannsen vs. Dundas*, p. 269.

The Court is invested with discretionary power to grant or to refuse applications made under section 175, Act VIII., for the examination by Commission of witnesses resident more than 100 miles distant from Calcutta. *Burney vs. Eyre*, p. 68.

CONTEMPT OF COURT.

A Barrister, offended by the use of a strong expression on the part of a Judge, sends an officer to the Judge's private residence upon a pacific message to ask for an explanation. Held by nine Judges out of eleven that the party sending the message and the party

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conveying it are guilty of contempt of Court. *In the Matter of Piffard and Francis*, p. 79.

CONTRACT.

If a party enters into a contract to provide and ship molasses at the risk and expense of the seller, he must be taken to guarantee that the casks are proper casks and properly coopered for any voyage from Calcutta, for which such goods may be reasonably ordered by the plaintiffs to be shipped. *Palmer vs. Cohen*, p. 123.

A tug, not sufficiently powerful for the task, contracted to tow a ship from the Sandheads to Calcutta. The Captain of the ship, though informed by the pilot that the tug was too weak for the work, allowed her to make the trial, but was ultimately obliged to throw her off. *Held* that nothing could be recovered upon the original agreement, but that the tug was entitled to a *quantum meruit* for work and labour done. *Avdall vs. Kelso*, p. 260.

A party having two tugs, A and B, undertakes to supply tugs for two vessels, P and Q, in the order of their engagements, as soon as the tugs are free. A is first free and tows P, which has the first claim, to Diamond Harbour, where she becomes disabled; B subsequently tows Q, but, finding A disabled at Diamond Harbour, leaves Q and tows P out to sea, returning afterwards for Q. *Held* that B was not justified in leaving Q, but that she ought to have towed her out to sea without interruption. *Nowrjee Nusserwanjee vs. Johannes Avdall*, p. 293.

CONVERSION.

Two notes are stolen from A, which B (not a *bona fide* holder for valuable consideration) tenders to C in payment for certain articles. C, not knowing B, refuses to deal with him, whereupon B brings D, who is known to C, and the purchase is made by him. *Held* that

the part which D performed in the transaction amounted to "a conversion of the notes to his own use," and that he is liable to A. *Kissorymohun Roy vs. Rajnarain Sen*, p. 263.

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Where there is no original matter in a work, the strongest evidence of servile imitation and piracy must be afforded. *Roussac vs. Thacker*, p. 9.

COSTS.

Persons improperly bringing suits in the High Court which fall within the jurisdiction of the Small Cause Court may be mulcted not only in their own costs, but also in those of the defendant. *Sikhurchund vs. Sooringmull*, p. 272.

A portion of the costs awarded to the losing party in the exercise of the discretionary power given by Act VIII. of 1859, section 187. *Soudamoney Dossee vs. Juggomohun Sen*, p. 172.

When an ill-conditioned person files a plaint for partition solely for the purpose of inflicting injury upon his joint-holders, the Court will, in the exercise of the power conferred by section 187, Act VIII., mulct him in the entire costs. *Bhoobun Mohun Dey vs. Denonauth Dey*, p. 122.

CUSTODY.

The father, if a proper person, cannot be deprived of his legal right to the custody of his legitimate children of whatever age. 2 and 3 Vic., c. 39, which gives a discretionary power to a Judge in England, has not been extended to this country; therefore the law applicable to cases which occurred in England prior to the passing of that statute is applicable here. *In the Matter of Holmes*, p. 99.

A person placed in a lunatic asylum under section 390 of the Criminal Procedure Code is detained there after the recovery of his reason. *Held*

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that such detention was wrongful, but not illegal. *In the Matter of H. S. Eldred*, p. 173.

The High Court in its equitable jurisdiction has authority to interfere with the legal right of a father to the custody of his child, if he be an improper person. *In the Matter of A. E. Carrau*, p. 143.

Rule *nisi* for a *Habeas corpus* to bring a Hindoo purdah lady before the Court, on the ground of her detention from her husband against her will. Commission to ascertain her wishes. *In re Thakoormoney Dossee*, p. 196.

The legal age of discretion for Hindoos in India is uniformly sixteen years. Up to that age the father has an undoubted right to the custody of his children. *In the Matter of Hemnath Bose*, p. 111.

DAMAGES.

When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. *Palmer vs. Cohen*, p. 123.

DEPOSITIONS.

Section 111 of Act I. of 1859 applies only to the depositions of Merchant seamen. *Reg vs. Ramcomul Miller*, p. 195.

DOCUMENTS.

Plaintiffs must, on the presentation of their complaints, produce in Court the originals of the documents relied on by them in support of their claim.

When a plaintiff can satisfy the Court at the hearing that some document on which he desires to rely was not presented with the plaint, because he was ignorant of its existence at the time, the Court will probably allow it to be received as evidence. *Campbell vs. Keith*, p. 287.

A discretionary power is vested in the Court with reference to the reception of documents, and in the case of *bond fide* applications it will be exercised largely. *Promsook Chunder vs. Rajkisto Miller*, p. 145.

EXECUTION.

Construction of Act VI. of 1855. *Toyluckmohun Tagore and another vs. Govinchunder Sen*, p. 289.

FEES.

Section 98, Act VIII. of 1859, is applicable only to Mofussil Courts, and a Judge exercising the ordinary original jurisdiction of the High Court has no power to remit fees under any circumstances. *Barrow vs. Pollock*, p. 149.

FINES.

The Court in its criminal jurisdiction has no power to dispose of fines inflicted upon prisoners. Such power exists in Government alone. *Reg. vs. Goluck Doss*, p. 282.

HOONDEE.

A party who receives a hoondee for a particular purpose must apply the same accordingly; and neither he, nor any third party knowing the facts, can, by afterwards receiving the amount, detain the same from the principal.

Query: Whether a hoondee made payable to order is, according to Hindoo law and the custom of native merchants, negotiable without a written endorsement by the payee. *Rajroopram vs. Buddoo*, p. 155.

INJUNCTION.

An injunction will be granted to restrain a person from using trade-

marks or tickets which are colourable imitations of those used by another party, even though the person offending is not actuated by any fraudulent intention. *Hugh, Balfour and Co. vs. Edward Dunbar, Kilburn & Co.*, p. 270.

JURISDICTION.

The High Court, under Letters Patent, sec. 12, has jurisdiction in all cases where the amount claimed is over Rs. 100, whatever may be the amount received. Persons improperly bringing suits in the High Court which fall within the jurisdiction of the Small Cause Court may be mulcted not only in their own costs, but also in those of the defendant. *Sikhurchund vs. Sooringmull*, p. 272.

The High Court has jurisdiction to try the maritime causes of any ships, whether Foreign or British, wherever the cause of action may have accrued, provided the ships come within the jurisdiction of the Court. *The "Garland" vs. The "Dragon"*, p. 275.

The Secretary of State in Council may sue and be sued in any such Court or Courts as may have jurisdiction in respect of each particular cause of action.

Suits instituted in the Mofussil Courts may be heard in the High Court by way of appeal, or removed there in the first instance for trial by the Court in its Extraordinary Original Jurisdiction.

The Secretary of State in Council cannot be said to be within the ordinary jurisdiction of the High Court. *Rundle vs. Secy. of State in Council*, p. 37.

The High Court has jurisdiction to hear appeals in testamentary cases. *Sarodosoondery Dossee vs. Tincowry Nundy*, p. 223.

The High Court of probate or letters of administration from the late Supreme Court is no ground for subjecting the party obtaining them to the jurisdiction

of the High Court in matters connected with the estate in respect to which probate or letters of administration were so obtained. *Leslie vs. Inglis*, p. 67.

The High Court cannot exercise jurisdiction in respect to land which is situate out of its local limits, even though it be in possession of the Receiver. *Denonath Sreemoney vs. C. S. Hogg*, p. 141.

The High Court, in the exercise of its civil jurisdiction, has not the power to execute its own decree, or serve its own process out of the local limits of such jurisdiction. *Sagore Dutt vs. Ramchunder Mitter*, p. 130.

Although the High Court in its Original Jurisdiction has no jurisdiction over land or other immoveable property situate beyond the limits of Calcutta, and can make no adjudication of the right and title to such land, yet where a party is personally subject to the jurisdiction, the Court has power to declare whether or not such party holds the land subject to a trust. *Bagram vs. Moses*, p. 284.

When an objection to the jurisdiction is first taken at a late stage of the suit, instead of being brought forward, as it should be, at the first stage of the suit when the plaint is presented for admission, the proper course is, even if the jurisdiction be doubtful, to proceed to determine the suit. *J. C. Bagram, Executor of G. M. Gasper vs. O. Moses and E. Gasper*, p. 285.

"LIS PENDENS."

The doctrine of *lis pendens* is applicable to natives of this country, and has a wider application here than in England. *Kasim Shaw vs. Unnodapersaud Chatterjee*, p. 160.

MARRIED WOMAN.

Jewels given to a married woman during coverture by a relative or a

stranger, *held* property belonging to the separate use of the wife. *Held* further that the subsequent investment of the same in the purchase of real estate conveyed to the wife does not cause a change in the nature of such property. *Cohen vs. Auction Company*, p. 180.

Furniture the separate property of the wife does not pass to the assignee under a fiat against the husband. *In re Gordon*, p. 201.

A Hindoo woman may at all times sue either alone or jointly with her husband. *Bhoirub Chunder Doss and Sreemutty Bemulmoney Dossee vs. Madhubchunder Paramanick*, p. 281.

Hebabil Ewaz, or deed of gift made in contemplation of marriage, is not a revocable instrument. *Bibee Kulsoon vs. Bibee Ameerrunnessa*, p. 150.

POLICY.

When a policy has been effected on a gross quantity of sugar, the fact that the sugar has been described in the margin of the policy as being in different lots containing different species of sugar, and being separately priced, does not raise any presumption that a separate insurance upon each species of sugar was intended by the policyholder. *Hadjee Foosoop vs. Vardon*, p. 198.

PLAINT.

The Court has power to strike out of a plaint parties improperly introduced. *Bhoirub Chunder Doss and Sreemutty Bemulmoney Dossee vs. Madhubchunder Paramanick*, p. 281.

Act VIII. gives the Court no power to allow a plaint to be amended after it has been admitted, except for the purpose of adding parties. *Weguelin vs. Moffat*, p. 98.

PRACTICE.

When a defendant shews *bond fides* by offering to pay anything like a fair

proportion of his debt, a reasonable time will be granted to enable him to pay the remainder. *Subatollah Sircar vs. Thompson*, p. 98.

A payer for honour, though entitled to the same remedies upon the bill as the party for whom payment was made, is not entitled to bring a suit in his own name and on his own behalf for the value of the goods for which the bill was drawn. *Carmichael vs. Brojo-nath Mullick and Rajkhissen Dutt*, p. 274.

The words "attachment and sale" in section 203 of Act VIII. of 1859 are to be taken together, and not distributively; and, taken in that sense, it is clear that a sale of mortgaged premises is to follow an attachment, and not to be an independent proceeding unconnected with a previous attachment.

The words "otherwise as the case may be" in section 212 mean that the mode of execution is to be adapted in each case to the nature of the particular relief sought to be enforced under the decree. *Denonath Ruckit vs. Mutty Lall Paul*, p. 158.

The only enactment in relation to civil procedure now in force besides Act VIII. of 1859, and the Acts modifying such Act, are Act XVII. of 1852 and a part of Act VI. of 1854. *Sagore Dutt vs. Ramchunder Mitter*, p. 136.

A claim to property under section 246 of Act VIII. of 1859 is virtually a suit for land. *Sagore Dutt vs. Ramchunder Mitter*, p. 136.

See also COSTS, DOCUMENTS, FINES, FEES, JURISDICTION, PLAINT, SUMMONS, AND WRITTEN STATEMENT.

SALVAGE.

Measure of remuneration for salvage services. *Collom vs. The Ship "Chowringhee,"* p. 254. *P. and O. Steam Navigation Co. vs. The Ship "Fort George,"* p. 208.

A dinghee laden with gilders valued at Rs. 20,000 was being propelled across a river, when a squall coming on, and the dinghee being in some danger, the gilders were taken on board a flat for safety and kept there till the squall subsided. *Held* that the owner of the flat had no claim for salvage, and that Rs. 150 was a fair remuneration for services rendered. *Urnachurn Chetty vs. Gordon*, p. 212.

SMALL CAUSE COURT.

Persons improperly bringing suits in the High Court which fall within the jurisdiction of the Small Cause Court may be mulcted not only in their own costs, but also in those of the defendant. *Sikhurchund vs. Sooringmull*, p. 272.

SPECIFIC PERFORMANCE.

Specific performance not decreed in favour of a party who is incapable of performing his own part of the agreement. *Bungseedhur Mullick vs. Calcutta Auction Co.*, p. 45.

STATUTE OF FRAUDS.

Section 17 of Statute of Frauds does not affect Hindoo or Mahomedan defendants. *Borradaile vs. Chainsook Buxyam*, p. 51.

SUMMONS.

Service of a summons intended for one partner upon another partner of the same firm is not a sufficient service. Partners are not the recognized agents of each other within the meaning of clause 2, sec. 17, Act VIII. *Lutchmeput Dogare vs. Sibnarain Mundle*, p. 97.

For the purposes of summons a Railway Company must be deemed to dwell at its principal office. *Hanlon vs. India Branch Railway Company*, p. 197.

Act VIII. of 1859 confers no authority upon a Judge to issue summons to

a witness to attend on settlement of issues. *Anundchunder Banerjee vs. Woomess Chunder Roy*, p. 147.

A Mofussil Judge stated in his return to the Sheriff of Calcutta that substituted service had been effected by fixing a copy of the summons to the "house" of the defendant. *Held* that the return was insufficient, and that the word "dwelling-house" must be expressly mentioned. *Buddoo Baboo vs. Lambadur Mullick*, p. 132.

TESTAMENT.

A military testament valid in its inception may be deprived of its privileges by lapse of time. *In re Godby*, p. 196.

Construction of a will. *Miranda vs. Han*, p. 96.

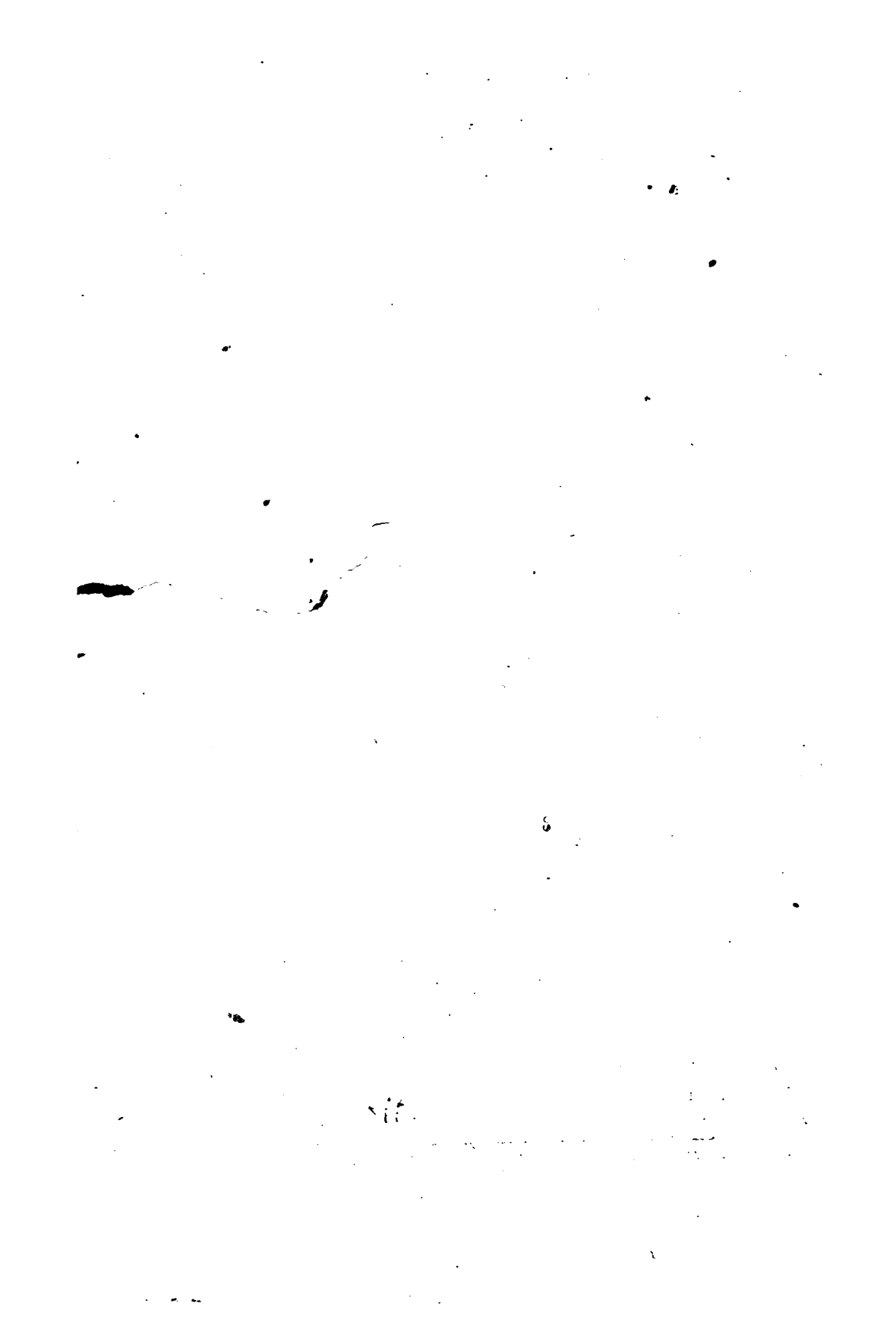
The will of a childless Hindoo giving power to adopt a son, though opposed to the interests of the widow and the next heir in reversion, is not inofficious. *Sarodasoondery Dossee vs. Tincowry Nundy*, p. 223.

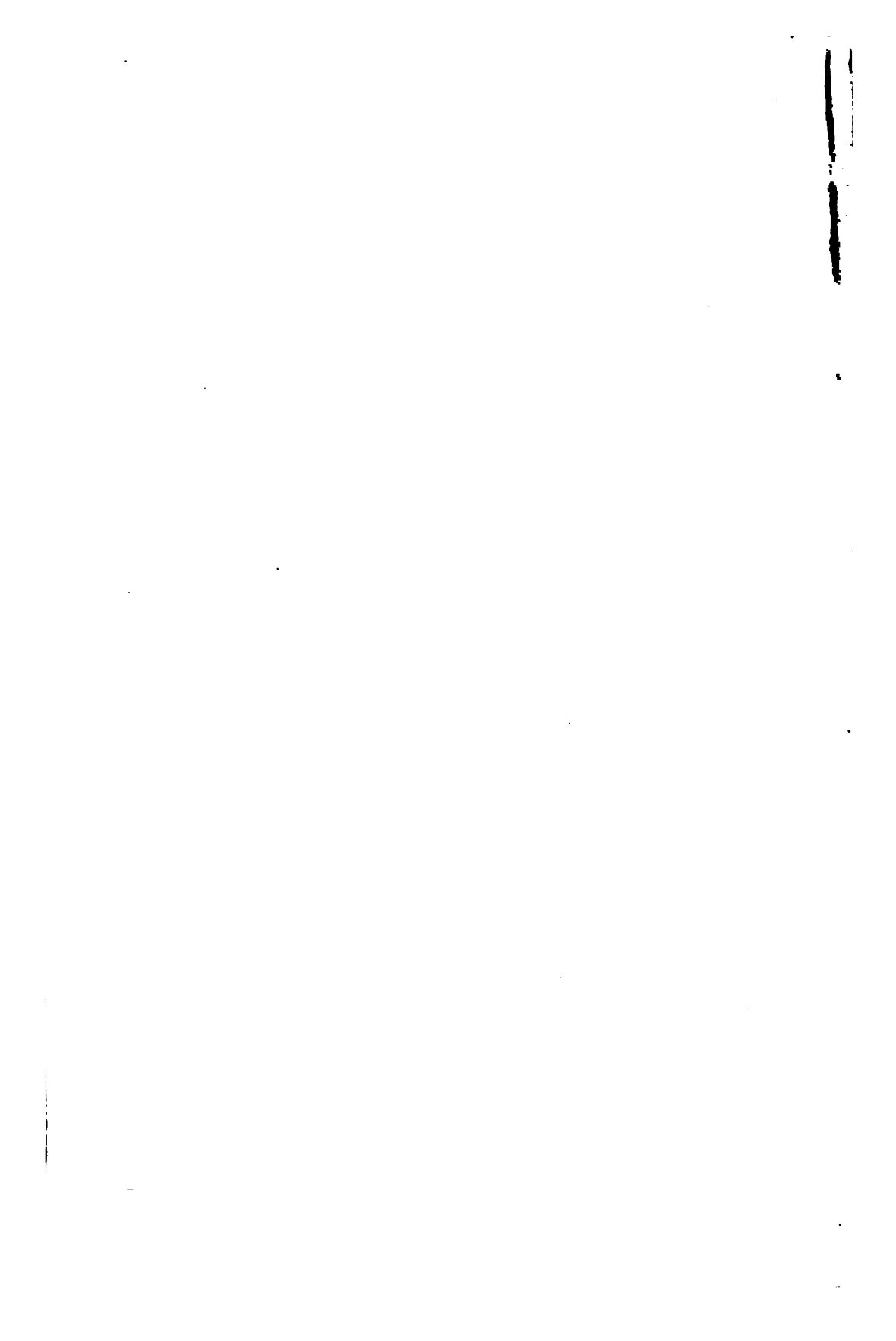
The High Court has jurisdiction to hear appeals in testamentary cases. *Sarodasoondery Dossee vs. Tincowry Nundy*, p. 70.

WRITTEN STATEMENT.

A written statement under Act VIII. of 1859 is required to set forth a full and true narrative of the facts of the case, and a party cannot be allowed any discretion as to whether he will state or withhold a fact of importance. *Sreenath Mullick vs. Brijolall Pyne*, p. 30.

Written statements must be prepared with great care and deliberation so as to dispense altogether with parol evidence at the settlement of issues. *Anund Chunder Banerjee vs. Woomess Chunder Roy*, p. 147.





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